TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 195

COLUMBUS & GREENVILLE RAILWAY COMPANY ET AL., APPELLANTS AND PETITIONERS,

vs.

W. J. MILLER, STATE TAX COLLECTOR, FOR THE USE OF THE MISSISSIPPI LEVEE DISTRICT

APPEAL FROM AND ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

APPEAL FILED JUNE 10, 1930

PETITION FOR CERTIORARI FILED JULY 17, 1930

CERTIORARI GRANTED OCTOBER 20, 1930

(35,117)

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APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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[fols. 1 & 2] [Captions omitted]

[fol. 3]

IN CIRCUIT COURT OF MONTGOMERY COUNTY

No. 2047

W. J. Miller, State Tax Collector, for the Use of Mississippi Levee District

vs.

Columbus & Greenville Railroad Company

Declaration—Filed July 31, 1928

Now comes the plaintiff, W. J. Miller, the duly elected, qualified and acting State Tax Collector of the State of Mississippi, who sues for and on behalf of the Mississippi Levee District and subdivision of the State of Mississippi, organized and existing under the laws of the State of Mississippi, and domiciled at Greenville, Mississippi, and complains of the defendant herein, Columbus & Greenville Railroad Company, a corporation incorporated under the laws of the State of Mississippi, and having a line of Railroad running through the said County and State, and having offices and agents thereon, upon whom personal service of process may he had, and for his cause of action states as follows:

1

That the plaintiff herein, W. J. Miller, State Tax Collector, is the duly elected, qualified and acting State Tax Collector of the State of Mississippi, authorized by law to sue for and recover any monies due the State of Mississippi, or any Levee District thereof, or any taxes or back taxes that may be due said Levee District of the State and he brings this suit for and on behalf of the Mississippi Levee District, incorporated under the laws of the State of Mississippi, and composed of the counties of Bolivar, Washington, Issaquena, Sharkey, and parts of Warren and Humphreys Counties.

[fol. 4] 2

That the defendant herein, the Columbus & Greenville Railroad Company, is a railroad corporation, incorporated and existing under the laws of the State of Mississippi, since January 1st, 1926, down to the present time and owning or operating a line of railroad extending from Greenville, Washington County, Mississippi, to Columbus, Lowndes County, Mississippi.

3

That under Chapter 262 of the Laws of 1914, a tax of three hundred and fifty dollars ($350.00) a mile is imposed on every main or trunk line of railroad running through the said Mississippi Levee District, for the use of said Levee District in the protection of the said property from overflow from the Mississippi River.

4

That the said defendant company during the years 1926 and 1927 was then and there seized and possessed of, and owned and operated a trunk or mainline of railroad extending for a distance of eighteen and forty-one hundredths (18.41) miles from the City of Greenville to Sunflower County, within the said Mississippi Levee District and became and were thereby subject to the payment of said tax of three hundred and fifty dollars ($350.00) per mile, and that said taxes accrued on September 1st, 1926 and on September 1st, 1927.

That on September 1st, 1926, the said defendant company owed the said Levee District as follows:

18.41 of main line at $350.00 per mile	$6,443.50
Said railroad only paid of said amount in October, 1926, the sum of	920.50
Leaving a balance due said Levee District of	$5,520.00
10 per cent damages thereon for the said year 1926	552.30

[fol. 5] That for the year 1927 defendant company became liable for and only paid taxes as listed below Eighteen and

Forty-one Hundredths (18.41) miles of main or trunk line at Three Hundred and Fifty Dollars ($350.00) per mile due in September, 1927, $6,443.50; that said railroad paid of said amount in October, 1927, the sum of $920.50, leaving a balance due said Levee District of $5,523.00; that Ten per cent (10) pct. damages thereon for the year 1927 amounts to $552.30 making a total amount due said Levee District for the said years 1926 and 1927 and unpaid of $13,150.60.

5

Plaintiff would further show that the Legislature of the State of Mississippi attempted to enact Chapter 259 of the Laws of 1926 attempting and proposing to amend Chapter 282 of the laws of 1914 so as to provide by said amendment that the tax of Three Hundred and Fifty Dollars ($350.00) per mile on all main and trunk lines should be reduced to Fifty Dollars ($50.00) per mile on all main lines of railroad running through said Levee District, having less than Twenty-five miles of main line in said District; that said defendant company attempted to pay said taxes imposed by law under this said Chapter 259 of the laws of 1926. Plaintiff would show that said Chapter 259 of the laws of 1926 is and was unconstitutional, inoperative, null and void, for the reason that the same was passed in utter violation of Section 234 of the Constitution of the State of Mississippi, in that the said Section 234 of the State Constitution requires that no bills changing or affecting the taxation or revenue of the Mississippi Levee District shall be considered or passed by the State Legislature without the said proposed bill having been published in the County of the domicile of said Levee District for four weeks prior to its introduction in said Legislature.

[fol. 6] Plaintiff charges, alleges and avers that said Chapter 259 of the Laws of 1926 was not published in a newspaper in the County in which is situated the domicile of the Board of Levee Commissioners of the said Mississippi Levee District to be affected thereby for four weeks prior to the introduction thereof in the Legislature; and that said bill was not published at any time in said County of the domicile of the said Mississippi Levee District and that in the passage of said act, attempting to amend Chapter 282 of the Laws of 1914 the said Legislature acted in total disregard and viola-

tion of the mandate of Section 234 of the said Constitution and that said Chapter 259 of the Laws of 1926 having been passed in violation of said Constitution was and is inoperative, null and void, and that the said defendant railroad company became, was and is liable for the full amount of said taxes of Three Hundred and Fifty Dollars ($350.00) per mile for the Eighteen and Forty-one Hundredths (18.41) miles of main and trunk line running through said Levee District, less the payments thereof of Fifty Dollars ($50.00) per mile for each of said years; that by reason of the foregoing the said defendant then and there became, was and is indebted to the Mississippi Levee District in the sum of Eleven Thousand and Forty-six Dollars ($11,046.00), together with the Ten per cent (10 pct.) damages allowed thereon by law for the said years 1926 and 1927, and for interest thereon from the dates thereof to the time of recovery herein of Six per cent (6 pct.) per annum on said amount.

Wherefore plaintiff brings this suit for and on behalf of the said Mississippi Levee District for the use of the Mississippi Levee Board and demands judgment against the said defendant railroad company in the full sum of Twelve Thousand One hundred and fifty and 60/100 Dollars ($12,-[fol. 7] 150.60), together — interest thereon and all costs of this suit.

Franklin, Easterling & Fox, Attorney- for Plaintiff.

[File endorsement omitted.]

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

DEFENDANT'S PLEAS

Comes the Columbus & Greenville Railway Company, by its attorneys and for a plea to the plaintiff's declaration exhibited against it in the above-entitled cause, says that it is not indebted to the plaintiff in the manner and form alleged in the plaintiff's declaration, and to this, it puts itself upon the country.

Vernon Rowe, Gardner, Odom & Gardner, Attorneys for Defendant.

[fol. 8] IN CIRCUIT COURT OF MONTGOMERY COUNTY

NOTICE TO PLAINTIFF—Filed Oct. 12, 1929

To the plaintiff and/or his attorneys of record:

You will take notice that at the trial of the above entitled cause the defendant will show that it operates less than twenty-five (25) miles of railroad in the Mississippi Levee District, and has heretofore paid, as required by law, the full tax imposed on it under Section 259, Mississippi Laws of 1926, which law affords and provides for a reasonable legislative classification of railroad in the Mississippi Levee District for taxation purposes, and is entirely consistent with and valid under the Fourteenth Amendment to the Constitution of the United States. The said defendant having discharged its liabilities to said Mississippi Levee District under said act, now sets up, alleges and avers that it has acquired, and now has, under the Fourteenth Amendment to the Constitution of the United States, the right, privilege and immunity from further liability for taxes to the said Mississippi Levee District.

And the defendant will further show that the statue levying the mileage tax demanded by plaintiff in this suit, i. e. Chapter 7 of the Laws of Mississippi of 1886, as amended by Chapter 282 of the Laws of 1914 and Chapter 259 of the Laws of Mississippi of 1926, is arbitrary, unreasonable and in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, and that said statute is also unconstitutional and void and a burden on interstate commerce; in violation of Clause 3, Section 8, Article 1 of the United States Constitution, and in support of said contention defendant will introduce evidence to show that defendant's property is not benefited by the levees of the Mississippi Levee District any more than other property in said district, in proportion to value; that railroad property in general is not benefited [fol. 9] more than other property in said district in proportion to value; that during the year 1926 defendant had railroad property in said Mississippi Levee District consisting of 18.41 miles of main track which has been duly valued and assessed by the Mississippi State Tax Commis-

sion for said year at the sum of $18,410.00; that the tax on said property for the year 1926 at the rate levied by the Mississippi Levee District, to-wit, four (4) mills on the dollar, would have been $73.64 which is approximately $3.90 per mile; that the amount of tax which defendant has already paid to said Levee District for levee purposes for the year 1926 at the rate of $50.00 per mile is $920.50; that the tax as claimed by plaintiff on the basis of $350.00 per mile would be $6,433.50. Defendant will further show that its property in said district, consisting of 18.41 miles of main track, has been duly valued and assessed by the Mississippi State Tax Commission for the year 1927 at $18,410.00; that the ad valorem tax as levied by the Commissioners of the Mississippi Levee District for the year 1927 at the rate of five (5) mills on the dollar would be $92.05 which is approximately $4.90 per mile; that the amount of tax which defendant has already paid for the 1927 year to said Levee District for levee purposes, on the basis of $50.00 per mile is $920.50; that the tax as claimed by plaintiff on the basis of $350.00 per mile would be $6,433.50. The defendant will show that the tax as claimed by the plaintiff under said laws of 1886 as amended is seventy (70) times the amount of any just and fair tax or assessment on the property of this defeendant for levee purposes, and is, therefore, a denial of the equal protection of the laws as above stated. Defendant owns only 223 acres of land in the Mjssissippi Levee District which included a total area of approximately 1,300,000 acres. Therefore, defendant owns only .017% of the total area. Defendant has already paid taxes for the years 1926 and 1927. The amount of which [fol. 10] is .134% of the total revenue raised in said district for levee purposes, and if contentions of the State Tax Collector are sustained it would have to pay an amount which would be .947% of the total revenue. The amount of the tax which defendant would have to pay as claimed by the Revenue Agent is, therefore fifty-five (55) times greater than the tax defendant would have had to pay if the tax had been levied in proportion to area.

Defendant will further show that said Chapter 7 of the Laws of 1886 as amended is arbitrary and unreasonable and a denial of equal protection of the laws not only as to

this defendant, but as to railroad property generally in said Levee District; that there are in the Mississippi Levee District, and were during the years 1926 and 1927, only two railroads, to-wit: The Columbus & Greenville Railway Company having 18.41 miles of main track valued and assessed by the Mississippi State Tax Commission for the years 1926 and 1927 at $18,410.00 and $18,410.00 respectively, and the Yazoo & Mississippi Valley Railroad Company consisting of 117.15 miles of main line assessed by the Mississippi State Tax Commission at $3,514,500.00 or $30,000.00 per mile, for the year 1926 and $3,280,200.00, or $28,000.00 per mile for the year 1927. Defendant will show that the tax on the ad valorem basis of The Yazoo & Mississippi Valley Railroad Company main line would have been $14,058.00 for the year 1926, whereas under the mileage statute the tax actually claimed and collected at the rate of $350.00 per mile was $82,656.00; and the ad valorem tax on the property of said Yazoo & Mississippi Valley Railroad Company for the year 1927 would have been $16,441.00, whereas the mileage tax as claimed and collected on the basis of $350.00 per mile was $80,450.20. The amount of tax due from all railroads in said district on the mileage basis was, therefore, [fol. 11] over five (5) times as great in proportion to value as the tax imposed on other property in said district.

Defendant will further show that the defendant is not estopped to contest the validity of the said Act of 1885 the amount of the tax under said statute, which was fixed at the rate of $100.00 per miles, was not greatly in excess of the amount of the tax on the ad valorem basis; that the discrimination has become so excessive as to amount to a denial of equal protection of the laws only during recent years, and by reason of amendment in the said statute increasing the rate per mile to $350.00 per mile in 1914, and by reason of the judicial construction demanded at the instance of plaintiff in this suit declaring the amendment of 1926 to be void. Defendant would show that when the discrimination in the tax demanded of this defendant became so gross as to be unbearable, this defendant, before seeking the protection of the courts, sought and obtained the amendment to the said law of 1886 which was enacted by the Legislature, known as Chapter 259 of the Laws of 1926, which

amendment had the effect of fixing the levee tax of this defendant at the rate of $50.00 per mile, and thereby greatly lessening the discrimination against this defendant. Defendant would show that since this defendant obtained said relief from the Legislature the Mississippi Levee District has not claimed any higher or greater tax against this defendant than said tax of $50.00 per miles as fixed by said amendment, but now that the plaintiff is claiming tax at the rate of $350.00 per mile this defendant is forced for the first time to seek the protection of its constitutional rights.

Defendant would further show that the said Chapter 7 of the Laws of 1886 as amended in 1914 and in 1926, as above stated, is arbitrary, unreasonable and a denial of the [fol. 12] equal protection of the law, in violation of the said Fourteenth Amendment to the Constitution of the United States, and is an undue burden on interstate commerce and in violation of Clause 3, Section 8, Article 1 of the Constitution of the United States because the plaintiff claims that by virtue of Chapter 156 of the Laws of Mississippi of 1896, as amended from time to time, this defendant is also liable to pay taxes to said Mississippi Levee District for levee purposes based on the value of its property like all other owners of property in said district, and that the said mileage tax as imposed by the Act of 1886 as amended is not in lieu of all other taxes on railroad property for levee purposes as has been heretofore understood, but is an additional tax to be collected on railroad property in addition to the ad valorem tax imposed by said Act of 1896. Defendant will show that this plaintiff has commenced and is conducting a lawsuit against another railroad in said Mississippi Levee District to enforce the collection of said ad valorem tax on railroad property in addition to the mileage tax, and defendant is informed and believes, and so charges, that the plaintiff in this suit will attempt to enforce collection of said ad valorem tax from this defendant. This defendant charges that if the said Levee District, either through its own officers or through the plaintiff, the State Tax Commission, claims and attempts to collect the said ad valorem tax on the property of this defendant as well as the said mileage tax which is being sought in this suit, then the said mileage tax would be and is a double tax,

and for that reason a denial of equal protection of the laws and in violation of the Fourteenth Amendment to the Constitution of the United States, as above stated.

This defendant would further show that it is a railroad company engaged in the business of operating a railroad in interstate commerce which cannot be abandoned without the consent of the Interstate Commerce Commission; that [fol. 13] it is and has been for a number of years in such precarious financial condition that the additional burden attempted to be imposed by the plaintiff in this lawsuit would greatly endanger its ability to carry on its business in interstate commerce and would constitute a very serious and material burden on said commerce; that said burden would be out of all proportion to any benefits derived from levees or from the privilege of operating in said Mississippi Levee District.

Defendant will further show that the said Act of 1886 as amended, which provides for the tax at the rate of $350.00 per mile, also provides that whenever any reduction is made in other levee taxes, then the Board of Levee Commissioners of said district shall make a proportionate reduction in the taxes assessed by this Act for that year, and shall notify the Railroad Company or other person operating said railroad of such reduction. Under the plan of raising revenue for the Mississippi Levee District, which was in force at the time of the adoption of the Mississippi Constitution of 1890, the railroad levee tax was $100.00 per mile of main track and the rate of taxation for ad valorem taxes was five (5) mills. This proportion continued until 1904, when the date of ad valorem taxation was raised to ten (10) mills which resulted in the railroad tax being raised in 1908 to $200.00 per mile, thereby maintaining this same proportion. In 1914 the ad valorem tax rate was raised to Seventeen and a half (17½) mills, and the railroad tax to $350.00 per mile, thus still retaining this same proportion. In 1917 the ad valorem tax rate was reduced to eight (8) mills, but the Board of Mississippi Levee Commissioners failed and refused to reduce the railroad tax proportionately. From 1922 to 1924 the ad valorem tax was ten (10) mills, but the railroad tax remained at $350.00 per mile. In 1925 the ad valorem tax was eight (8) mills, and

[fol. 14] the railroad tax was not reduced. In 1926 the Board of Mississippi Levee Commissioners reduced the ad valorem tax to four (4) mills, but made no reduction in the railroad tax. In 1927 the Board of Mississippi Levee Commissioners fixed the ad valorem tax rates at five (5) mills, but made no reduction in the railroad mileage tax. Defendant claims that the provisions of the Act of 1886 as amended were mandatory requiring the Board of Levee Commissioners to make a proportionate reduction in railroad taxes, and that if such reduction had been made, the railroad mileage tax would have ben reduced from $350.00 per mile to $80.00 per mile for 1926 and to $100.00 per mile for 1927.

And defendant will further show and prove that the Yazoo & Mississippi Valley Railroad Company has a mileage in said Mississippi Levee District of 117.15 miles of its main line which runs in a southerly direction from Bolivar County practically parallel with the Mississippi River, and a short distance therefrom to the southern boundary of said Levee District, while the defendant, the Columbus & Greenville Railway Company has a mileage of only 18.41 miles, while said line of railroad runs almost at right angles, so to speak, from the Mississippi River beginning at Greenville, Mississippi, in an eastwardly direction in said Levee District; that the relative benefits received and enjoyed by the Columbus & Greenville Railway Company from overflow from the Mississippi River are very small indeed, as compared with the relative benefits received from over-flow from the Mississippi River by the Yazoo & Mississippi Valley Railroad Company, a much larger and much stronger line; that the Yazoo & Mississippi Valley Railroad Company is an interstate line of railroad, while the Columbus and Greenville Railway Company is a purely intrastate railroad running from Greenville in an eastwardly direction to the Alabama State line, a distance of 178.23 miles; that it would be unreasonable, unjust and out of all proportion to the benefits received by the Columbus & Greenville Railway Company in the way of protection from overflow by the levee sys- along the Mississippi [fol. 15] River to make it pay the same levee mileage tax, towit: $350.00 a mile that is assessed against and paid by the Yazoo & Mississippi Valley Railroad Company, and that to require the Columbus & Greenville Railway Com-

pany, a much weaker and shorter line, with a smaller roadbed and smaller rail, and other improvements, to pay the same levee mileage tax which is paid by the Yazoo & Mississippi Valley Railroad Company of $350.00 a mile would be the taking of defendant's property without due process of law, and would be also a denial to it of equal protection of the law in violation of the Fourteenth Amendment to the Federal Constitution. Said defendant, therefore, claims and avers that to put it in the same class with the Yazoo & Mississippi Valley Railroad Company for the purpose of taxation, and require it to pay the same tax, to-wit: $350.00 a mile, as is assessed and paid by the Yazoo & Mississippi Valley Railroad Company, would be a gross and unconscionable wrong to this defendant, and as is already said, would be a denial to it of equal protection of the law, and also the taking of its property without due process of law in violation of said Fourteenth Amendment to the Federal Constitution, all of which is respectfully submitted.

Vernon Rowe, Gardner, Ogden & Gardner, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 16] IN CIRCUIT COURT OF MONTGOMERY COUNTY

MOTION TO STRIKE PARTS OF NOTICE—Filed Oct. 17, 1929

And now comes the plaintiff, by attorney of record, and respectfully moves the Court to require the defendant in said cause to strike out from the original notice filed under the general issue all such parts of said notice that are mere conclusion of law, and such parts as are mere conclusion of facts without stating any facts wherefrom such conclusion is drawn, so that the said defendant in the said notice filed under the plea of general issue limits the said notice as contemplated and authorized by Section 744, Mississippi Code 1906, and Section Hemingway's Code 1927, providing that if the defendant desires to prove "under the general issue in an action any affirmative matter in avoidance, which by the law may be proven under such plea, he may give notice for it in writing, etc."

That said notice, begining on the first page and ending on the second page with the words "Mississippi Levee District", recites no facts nor any matter which under the

law may ve proven, but merely a conclusion of law by the pleader and only tends to confuse the issue and befog the fair trial of said cause, and therefore is incompetent, irrelevant and redundant matter.

That beginning with the words "and the defendant will further show", in the said second page of said notice and down to the eleventh of said notice, which includes the words "and in support of said contention", should also be stricken out for the reasons hereinbefore set out. That all of the paragraphs, beginning with the last line on the said [fol. 17] second page, down to and including the nineteenth line on the third page, ending with the figure "$6,333.50", should be also stricken out. That beginning with the words "defendant will further show" on page four of the said notice and concluding with the words "tax imposed on other property in the said district" should be stricken out, and beginning with the middle of the last line on page five, to the words "constitutional rights" on page six, should also be stricken out; that all contained in page six of said notice be stricken out from the said notice, and also that part beginning at page seven including the words "United States", as above stated, may be stricken out; also all contained on pages seven, eight, nine and ten may be stricken out.

The said plaintiff also moves the Court to strike out the entire notice from the record for the reason that the said notice is so interwoven in its words and phrases, and the conclusions of law and conclusions of facts are so intermingled with other allegations that it can not be separate and distinct without creating a mess or confusion, and that the said entire notice from the beginning to the end is not the kind and class of notice contemplated by law or permitted under the practice and procedure heretofore recognized by this Honorable Court.

Wherefore, plaintiff respectfully moves the Court to strike out from the said file the notice under the general issue, as aforesaid, or to require the said defendant to file such notice, statement of facts or such evidenciary facts which under the well established rule of pleading and practice, said defendant be permitted to file or give notice of.

Franklin, Easterling & Canizaro, Attorneys for Plaintiff.

[File endorsement omitted.]

[fols. 18 & 19] IN CIRCUIT COURT OF MONTGOMERY COUNTY

No. 2047

W. J. MILLER, State Tax Collector for the Use of the Mississippi Levee District

vs.

COLUMBUS & GREENVILLE RAILWAY COMPANY

JUDGMENT—Oct. 17, 1929

This day came on to be heard the above entitled cause, but a jury being waived by the parties and the cause having been submitted to the court for decision without a jury by agreement, and the court having duly considered the evidence and the mandate from the Supreme Court in this cause and being fully advised in the premises and being of the opinion that the plaintiff is entitled to recover. It is therefore ordered and adjudged that the plaintiff W. J. Miller, State Tax Collector, do have and recover, for the use of the Mississippi Levee District, of and from the defendant, the Columbus & Greenville Railway Company, a corporation, the sum of $12,150.60 together with interest thereon at the rate of six per cent per annum from July 31st 1928 until paid, and all costs this suit, for all of which let execution issue.

Ordered and adjudged this 17th day of October 1929.

Jno. F. Allen.

[fol. 20] IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

Statement of Evidence

CAPTION

Be it remembered that this cause came on to be heard on the 17th day of October, A. D. 1929, at the court house in the City of Winona, Montgomery, Mississippi, same being the time and place appointed by law for the holding

of said term of court, and there being present as officers of said court the Honorable John F. Allen, Judge of the Fifth Judicial District of Mississippi, presiding, Mr. L. L. Latham, Sheriff of said county, Mr. F. M. Wingate, Clerk of the circuit court, and W. W. DeLoach, official court stenographer of said district; and a jury being waived by the parties and the cause having been submitted to the court for decision without a jury, by agreement, the following proceedings were then and there had, to-wit:

APPEARANCES OF COUNSEL

Messrs. Franklin, Easterling & Rosenthal and Hon. —— Canizaro present and representing the plaintiff.

Hon. V. D. Rowe and Messrs. Gardner, Odom & Gardner present and representing the defendant.

[fol. 21] Thereupon the plaintiff offered the following evidence on his part, to-wit:

R. C. FRAZIER, being produced as a witness for the plaintiff, after first being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Easterling:

Q. Mr. Frazier, what are your initials?
A. R. C.
Q. What is your business?
A. Publishing a newspaper.
Q. What newspaper is that?
A. The Leland Enterprise.
Q. Is that newspaper published in Washington County, Mississippi?
A. Yes, sir.
Q. What is your connection with that paper?
A. I am editor of the paper.
Q. Have you the records of that newspaper under your control and here before the court showing the publications of that paper?
A. Yes, sir.
Q. Have you examined the file*d* — that paper from September 1925 to January 15th, 1926?

A. Yes, sir.

Q. I will ask you to state whether or not a certain law entitled "A law to amend the act of 1886," in regard to railroad mileage taxes, being chapter 259 of the Laws of Mississippi, 1926, was published in your newspaper?

By Mr. Gardner: Counsel for the defendant objects to any testimony tending to show that the act in question [fol. 22] was not published in any newspaper in Washington County or in the levee district, for the reason that it is incompetent to attack the enrolled bill or go behind the enrolled bill now in the office of the Secretary of State and which is in the published acts of the Legislature of 1926; in other words, any testimony going to show the failure to publish this act is incompetent, irrelevant and immaterial, and counsel is precluded from going behind the enrolled bill in the office of the Secretary of State.

By the Court: The ruling of the court will be reserved to all this evidence.

Exceptions by defendant.

By Mr. Easterling:

Q. What was your answer to that?

A. No, sir; there was no notice published in our newspaper.

Q. No law changing the taxation of railroads was published from the period of September 1925 to January, 1926.

A. No, sir.

By Mr. Easterling: The act in question is Chapter 259 of the Laws of 1926, Senate Bill number 137, an act to amend section one, chapter 282, Laws of Mississippi, 1914, so as to reduce the tax on certain lines of railroad in the Mississippi Levee District.

AGREEMENT RE TESTIMONY OF L. P. SMITH

By Mr. Easterling: It is agreed by and between counsel representing the plaintiff and the defendant that Mr. L. P. Smith, the editor of the Daily Democrat Times, a newspaper published in Greenville, Mississippi, if offered as a witness would testify to the same facts in regard to the

publication of the law in his newspaper; that is, that this law was not published in his newspaper as required by the [fol. 23] constitution, and that these two papers are all of the newspapers published in the County of Washington, the domicile of the Mississippi Levee District. This agreement is put in subject to the ruling of the court as to the admissibility of the evidence, and the court reserves its ruling to same.

Cross-examination waived.

(Witness excused.)

By Mr. Easterling: We desire to offer in evidence, if your honor please, a certificate under the seal of the Mississippi Levee District showing the amount of mileage tax paid by the Columbus & Greenville Railway Company for the year 1926 and for the year 1927.

(Same is identified by the Stenographer as exhibit Number one).

Plaintiff rests.

[fol. 24] Thereupon the defendant offered the following evidence on its part, to-wit:

J. H. Rigby, being produced as a witness for the defendant, after first being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Gardner:

Q. Mr. Rigby, I believe you are superintendent of the Columbus & Greenville Railroad Company?

A. Yes, sir.

Q. And have been how long?

A. Ten years.

Q. What are your duties as superintendent, Mr. Rigby?

A. I have charge of transportation and mechanical and road way.

Q. Are you familiar with the condition of the property of the Columbus & Greenville Railroad Company, you are perfectly familiar with that, are you?

A. Yes, sir.

Q. What is the length of the road way?

A. 167.7 miles.

Q. That is the part operated by the Columbus & Greenville Railroad Company?

A. Yes, sir.

Q. The other part of the line is operated by the Southern?

A. Yes, sir.

Q. Are you familiar with the Y. & M. V. R. R. property in the delta?

A. Only a portion of it.

Q. What portion of it?

A. Well, from Benoit on the north to Percy on the south, [fol. 25] about three miles south——

Q. I want you to tell the court now the relative condition of the road bed of the Columbus & Greenville Railroad way as compared with that of the Y. & M. V. R. R. Co., if you know?

By Mr. Easterling: Counsel for the plaintiff objects to the foregoing as being incompetent, irrelevant and immaterial.

By the Court: The ruling of the court is reserved. Exceptions.

By Mr. Gardner:

Q. Go ahead, Mr. Rigby?

A. Well, the Y. & M. V. road bed is higher, I should say from four to six feet higher than the road bed of the C. & G. and is wider, has heavier rails; the Y. & M. V. R. R. has ninety pound new rails while the C. & G. has sixty pound old rails.

Q. When were those rails bought on the C. & G.?

A. I don't know when they were bought.

By Mr. Easterling: We want to enter the same objections to all these questions.

By the Court: All right, the same objections will be entered to all this evidence and the ruling of the court will be reserved.

By Mr. Gardner:

Q. You don't know when those rails were bought?

A. It was put down between 1885 and 1889.

Q. What about the physical condition of the depots and other buildings of the two roads, how do they compare?

A. Well, the Y. & M. V. depots are more modern, and the C. & G.'s are old.

Q. What are the better depots?

By Mr. Easterling: I want to get another objection in the [fol. 26] record, Counsel for plaintiff objects further to this line of questions and answers and this evidence on the ground that the tax sued for here is not an ad valorem tax but is an improvement tax.

Ruling of the court is reserved.

By Mr. Gardner:

Q. Which are the better depots?

A. The Y. & M. V. is better, more modern.

Q. What about the other buildings on the Y. & M. V. as compared with the C. & G.?

A. They are all better because they are more modern and better maintained.

Q. How does the Y. & M. V. run with reference to the Mississippi Levee District?

A. It runs practically parallel with it.

Q. How does the Columbus & Greenville Railroad run with reference to it?

A. At almost right angles.

Q. Do you know how many miles of railroad of the Columbus & Greenville is in the Mississippi Levee District?

A. I think 18.41.

Q. Tell the court from your knowledge and experience as a railroad man the relative benefits received by the Y. & M. V. Railroad and the Columbus & Greenville Railroad from levee protection?

By Mr. Easterling: We object to that as it is a matter of conclusion.

Ruling reserved by the court.

By Mr. Gardner:

Q. What was your answer?

A. The Y. & M. V. Railroad receives more benefits on account of the mileage and more buildings and depots and [fol. 27] section houses and mechanical buildings.

Q. The Columbus & Greenville Railroad leaves the Mississippi river at Greenville, I believe?

A. Yes, sir.

Q. What part of the levee system is there north of Greenville?

A. I don't know.

Q. Do you know about how much of the levee system there is north of Greenville?

A. No, sir, do not.

Q. If Greenville be about the half way distance, what would you say about the benefits received by the Y. & M. V. Railroad and the Columbus & Greenville Railroad from the levee district?

Objection. Ruling reserved.

Q. Would the Columbus & Greenville Railroad be protected or benefited by the levee south of Greenville?

A. No, sir.

Objection. Ruling reserevd.

Q. Why?

A. Because the current from the river does the principal damage.

Q. The levees that the Columbus & Greenville Railroad gets protection from are north of Greenville?

A. Yes, sir.

Q. And not south of Greenville?

A. No, sir.

Q. Are there any large towns on the Columbus & Greenville Railroad?

A. Not in that district except Greenville.

Q. Any outside of Greenville?

[fol. 28] A. No, sir, none outside of Greenville.

Q. Is the Columbus & Greenville interstate road or intrastate road?

A. Intrastate road.

Q. After the Columbus & Greenville Railroad leaves the delta tell the court what kind of country it passes through to Columbus, Mississippi?

A. From Greenville to Carrollton it is level country, and from Carrollton to Columbus is hilly.

Q. What kind of land does it pass through?

A. Well, the land is more productive in the delta section.

Q. What about the hilly section?

A. It doesn't produce as much.

Q. Tell the court whether there are any large industries on the Columbus & Greenville Railroad?

A. It is principally the saw mills and planers.

Q. Any large industries?

A. No, sir.

Q. Where is the termini of the Y. & M. V. Railroad?

A. Memphis on the north and New Orleans on the south.

Q. What is the largest town on the Columbus & Greenville Railroad?

A. I expect Greenwood is the largest.

Q. Any other large towns besides Greenwood?

A. Well, Winona, West Point and Eupora.

Q. Tell the court what character of business originates on the lines of the Columbus & Greenville Railroad?

A. Principally cotton and cotton seed production; well, from Carrollton east it is lumber and logs.

Q. Are there any large industries on the Columbus and [fol. 29] Greenville Railroad?

A. No, no large ones.

Q. What about the rolling stock?

A. All of the rolling stock of the Columbus & Greenville is second hand equipment.

Q. How many locomotives have they?

A. Twenty-seven.

Q. Are any of them new?

A. No, sir, second hand.

Q. Has the Columbus & Greenville any new equipment?

Objection. Ruling reserved.

A. Yes, sir, we have four gas electric cars bought in 1928, motor cars.

Q. How does the rolling stock of the Columbus & Greenville Railroad compare with the rolling stock of the Y. & M. V. Railroad?

A. All of the Columbus & Greenville's is old except the four gas electric cars referred to, while the Y. & M. V.'s is more modern.

Q. What about the locomotives of the Y. & M. V. are they larger than the locomotives of the Columbus & Greenville?

A. Yes, sir the Y. & M. V. handles about three times the amount of tonnage that the Columbus & Greenville engines will handle.

Q. What about the size of the rails?

A. The Y. & M. V. has new ninety pound rails, while the Columbus & Greenville has sixty pound old rails.

Q. Is this equipment of the Y. & M. V. new or second hand?

A. It is new.

Q. Do you know the capital stock of the Y. & M. V.?

A. No, sir, do not.

[fol. 30] Q. How long has the present management been operating the Columbus & Greenville Railroad?

A. Since, 1923.

Q. Since 1921 or 1923?

A. The receiver came in 1921 and it was reorganized in 1923.

Q. Do you know how many times this road has been in the hands of a receiver?

A. No, sir, do not.

Q. And it emerged from the receivership in 1923?

A. Yes, sir.

Q. You don't know whether the capital stock of the Columbus & Greenville Railroad is one hundred thousand dollars or not?

A. No, sir.

Q. How about the grades; are there any heavy grades on the Columbus & Greenville?

A. Yes, sir.

Q. Where are they?

A. The heaviest is just west of Winona about four miles.

Q. What is the result of that grade; what does it do?

A. It reduces the tonnage that could be handled; the engines can't handle the tonnage over those grades.

Q. How do you handle your freight trains on this road?

A. Most of them are what we call double headers, two engines handle them on account of the grades.

Q. How many trains do you operate as double headers?

A. We operate two each way a day.

Q. What size engines are they?

A. The cylinders are eighteen by twenty-six and the tractive power is twenty three thousand pounds.

Q. What about your freight trains as compared with the feight trains of the Y. & M. V. Railroad?

[fol. 31] A. Well, one engine on the Y. & M. V. will handle about three times the tonnage that our engines will handle.

Q. How many more freight cars will one engine handle on the Y. & M. V. Railroad than on the Columbus & Greenville?

A. We handle twenty-six or twenty-seven while the Y. & M. V. Railroad handles between ninety and a hundred.

Q. They handle about four times as much as you?

A. Yes, sir.

Q. What about the shop equipment of the Columbus & Greenville Railroad?

Objection. Ruling reserved.

A. It is antiquated.

Q. What is the physical condition of the property of the Columbus & Greenville Railroad as compared to the Y. & M. V.?

A. The property of the Y. & M. V. is much better.

Objection. Ruling reserved.

Q. How many shops does your road have?

A. The principal shop is at Columbus and a small shop at Greenville.

Q. What kind of shop do you have at Columbus?

A. Its an old shop and old machinery.

Q. What about the one at Greenville?

A. Its the same way.

Q. What about your passenger coaches?

A. They are all old, second hand.

Q. Have you any new equipment at all except these motor cars?

A. No, sir.

Q. How many freight cars did you have in 1926?

A. In 1926 we had twenty-five box cars; we had about seventy five freight cars altogether.

Q. In 1926?

[fol. 32] A. Yes, sir.

Q. How many locomotives did you have?

A. Twenty-seven.

Q. What was the cost of these twenty-seven locomotives about?

A. I think they cost about three thousand dollars a piece.

Q. That is second hand?

A. Yes, sir.

Q. What would they have cost now?

A. I couldn't say, Mr. Gardner, because they don't make any thing like that now.

Q. Why?

A. They are so old; they are about forty years old.

Q. What is the character of your locomotive?

A. They are old, out of date.

Q. Have you any new locomotives at all?

A. No, sir.

Q. Have you any new equipment at all except the four motor cars?

A. Nothing except some box cars that we bought on the credit.

Q. How many passenger trains do you operate on this road a day?

A. Two each way.

Q. How many freight trains do you run?

A. We have six, three each way a day.

Q. So you run six freight trains and how many passenger trains?

A. Two each way.

Q. Do you know anything about how many freight and passenger trains operate on the Y. & M. V.?

A. I don't know, I don't have any idea what they operate because it varies so, especially the freight.

Q. What kind of trains do the Y. & M. V. run, shorter or longer than the Columbus & Greenville?

[fol. 33] A. Longer than the Columbus & Greenville.

Q. How much longer?

A. Very often ninety cars.

Q. How many engines on the Columbus & Greenville Railroad would it take to pull those ninety cars?

A. About three engines.

Q. And you say this road emerged from the receivership in 1923?

A. Yes, sir.

Q. Mr. Rigby, I want to ask you about the cost of construction of the road bed of the Y. & M. V. and the C. & G.; what would you say was the relative heights and widths of the road beds?

A. The road beds of the Y. & M. V. is four to six feet higher than the C. & G.

Q. And how much wider?

A. It varies from two to four feet wider on account of the heavier engines.

Q. Is there any ballast on the Y. & M. V. Railroad?

A. Yes, sir, they have about four times as much ballast as we have.

Q. Tell the court about the trestles?

A. Those trestles on the Y. & M. V. are built of creosoted timbers; it is more expensive than the untreated pine on the C. & G.; the trestles on the C. & G. are just ordinary trestles built of un-treated timbers; the ballast deck trestles of the Y. & M. V. cost about thirty dollars a lineal foot, while the open deck type of the C. & G. cost about seventeen dollars a lineal foot.

Q. What about the iron bridges on the Columbus & Greenville Railroad, how many or how long have they been built and what is their lengths?

A. They are from a hundred and fifty feet to about four hundred and fifty feet.

[fol. 34] Q. Do you know every one of them?

A. Well, the bridge over the Tombigbee River is about a hundred and fifty feet long; it was built I believe in 1925, and the bridge over the Yazoo River is about four hundred and fifty feet; it was built in 1885—between 1885 and 1889.

Q. What is the condition of that bridge now?

A. It is very light; it was built between 1885 and 1889.

Q. What is its condition now?

A. Its in bad condition.

Q. What effect, if any, does that have on your transportation?

A. Well, you can't use heavy trains, heavy engines; the light engines are the only ones we can use over that bridge.

Q. How long is that bridge?

A. About four hundred and fifty feet; its three spans.

Q. That is the longest bridge you have; isn't it?

A. Yes, sir.

Q. What would it cost to replace that bridge; have you any idea?

A. No, sir, I haven't any idea.

Q. It is very expensive, isn't it?

A. Yes, sir.

Q. What is the next longest bridge?

A. The other three are all practically the same; Sunflower bridge is a more modern bridge; that was built I believe in 1915.

Q. That was before the receivership?

A. Yes, sir.

Q. One bridge has been built since the receivership only, and that was the bridge across Tombigbee River?

A. That bridge was built in 1915; it wasn't built since the receivership.

Q. Tombigbee River bridge was built when?

A. In 1915.

[fol. 35] Q. That was six years before the receivership?

A. Yes, sir.

Q. And the bridge across Sunflower was built then?

A. In the same year.

Q. What is the condition of those bridges now?

A. They are very good bridges.

Q. Have they been repaired?

A. Yes, sir.

Q. How many passenger trains did you say ran a day each way?

A. Two each way.

Q. And three freight trains each way a day?

A. Yes sir.

Q. Now with reference to your cross tries, what is the condition of your road bed compared with the Y. & M. V.?

Objection. Ruling reserved.

A. Ours is fair, and I will say that portion I am acquainted with the Y. & M. V. is good.

Q. What kind of ties do they use?

A. They use treated ties while we use partly treated and partly untreated.

Q. What road has the most ties?
A. The Y. & M. V.
Q. They are all creosoted, are they?
A. Yes, sir.
Q. Is there any difference in the rest of the ties your road uses and the ties of the Y. & M. V. use?
A. Yes, sir, the ties they use average about a dollar thirty-five, while the untreated ties average about eighty-five cents.
Q. The ties they use are creosoted?
A. Yes, sir.
Q. What is the longest freight train of the Columbus & Greenville Railroad that it takes two engines to pull?
[fol. 36] A. Between twenty-five and thirty loaded cars.
Q. What is the longest freight train the Y. & M. V. will carry with one engine?
A. I don't know the length; they carry between ninety and a hundred cars.
Q. And the greatest of your road is how many?
A. Twenty-five or thirty.
Q. Do you mean with one engine?
A. It takes two engines in the hills to handle twenty-five or thirty cars.
Q. I am speaking about the Y. & M. V., they handle between ninety and a hundred cars with one engine?
A. Yes, sir.
Q. That's all.

Cross-examination.

By Mr. Easterling:

Q. What did you say your name was?
A. Rigby.
Q. Mr. A. T. Stovall is your President?
A. Yes, sir.
Q. Do you know how much salary he gets?
A. I don't know sir.
Q. Isn't his salary twenty-five thousand dollars a year?

Objection. Ruling reserved.

A. I am not familiar with that at all.
Q. You have charge of the railroad bed and transportation?

A. Yes, sir, road way.

Q. Mr. Rigby, you know, as a matter of fact, from your experience in the delta that nearly all of the water ways is [fol. 37] what is denominated the delta section of Mississippi run parallel to the river, do they not, the main water courses?

A. Yes, sir.

Q. And the railroad in running east and west would cross more drainage canals and bayous and sloughs than one running north and south, wouldn't it.

A. Yes, sir, I expect so.

Q. Because the drainage runs parallel with the river?

A. Yes, sir.

Q. Could you tell us off hand how many trestles you have on your line in the delta district?

A. No, sir, I could not.

Q. They are every hundred feet or so apart, are they not.

A. Not that close.

Q. Well, every two or three hundred feet you have got a place for the water to pass under, for the drainage canals, bayous and sloughs, haven't you?

A. There is several drainage canals.

Q. You have to have a good many trestle to let the water pass under, don't you?

A. Yes, sir.

Q. You raised your road bed a couple of feet in 1927 after the overflow, didn't you?

A. We raised it some, it varied.

Q. As a matter of fact, where the Mississippi River would break, as it did north of Greenville in 1927, the tendency is to flood all these drainage canals and bayous and things that run south?

A. Yes, sir.

Q. As a matter of fact, in that last overflow more of your road bed was washed away than the Y. & M. V. wasn't it, because it hit your road side ways? Wasn't practically all of your road bed washed away in places? [fol. 38] A. It was washed away in places.

Q. Sometimes it would be as much as a mile or a mile and a half, wouldn't it?

A. Yes, sir.

Q. Washed it clear off?

A. Yes; sir.

Q. That was because the tendency of the water was to go south?

A. Yes, sir, it struck it nearly at right angles.

Q. Do you know what your road made net profit in 1925?

A. No, sir, don't.

Q. If the report to the railroad commission shows a net profit of $85,124.25, don't you know whether they made a profit?

A. Yes, sir, they made a profit.

Q. Does that sum sound right?

A. I don't know.

Q. They did make a profit?

A. Yes, sir.

Q. In 1926 if the report shows $159,392.98 would you say they made a profit? Do you remember about 1926, that was your banner year, wasn't it?

A. I think it was.

Q. And in 1927 the report shows $105,145.07 would you say that is correct?

A. I don't know exactly about that.

Q. I want you to answer another question. Isn't it a fact that your company has ordered three hundred new box cars?

A. Yes, sir.

Q. And isn't it further true that your company is figuring on selling to the Missouri Pacific?

A. I don't know that, I have heard it only through the newspapers.

Q. Do you know what the valuation of your railroad is as claimed by your company for the purpose of getting rates fixed?

[fol. 39] A. No, sir, I do not.

Q. You know you have to have a rate fixed by the Interstate Commerce — a valuation upon which the rates are fixed, don't you?

A. Yes, sir.

Q. I will ask you do you know that the Interstate Commerce Commission protested against a valuation of $4,470,534.00 and asked for an increase in the valuation of the road bed and equipment?

A. No, sir, I don't know that.

Q. That the railroad asked for an increase in valuation of the road bed and equipment?

A. No, sir.

Q. Do you know whether you were advised that your company claimed the valuation of that road should have been $6,948,549.00?

A. No, sir.

Q. You don't remember?

A. No, sir.

Q. You know that the Interstate — Commission valued it?

A. I don't know except what I read in the newspapers; the valuation was handled before I came here I believe in 1915.

Q. It was completed in 1924, wasn't it, the valuation on railroads?

A. Yes, sir, the results was probably obtained then, but the actual work in the field was done before 1920; that was before I came here.

Q. You were talking about the Y. & M. V. road and said you were familiar with it from Benoit to Percy?

A. Yes, sir.

Q. Now Percy is about twenty miles south of Leland, isn't it?

[fol. 40] A. Yes, sir, about that far south of Leland.

Q. As a matter of fact, the Y. & M. V. Railroad has a good many miles of feeder track through the delta, haven't they?

A. Yes, sir.

Q. They have a line that runs from Leland to Greenville?

A. Yes, sir.

Q. You have a line that runs out to Swan Lake?

A. Yes, sir, it has quite a net work of tracks.

Q. Isn't it a fact, Mr. Rigby, that until 1926 when this law was changed on mileage tax you all had been paying the same mileage tax as the Y. & M. V.?

A. No, I don't know anything about that.

Redirect examination.

By Mr. Gardner:

Q. I hand you a map made by the railroad commission of the State of Mississippi; examine it and note that the

railroad marked in red and in this levee district, what road is that?

A. The Y. & M. V.

Q. Note here at Greenville, what road is that running east?

A. The Columbus & Greenville Railroad.

Q. Now then, I will ask you to state about in what position is Greenville with reference to the termini of this district?

A. It is about sixty per cent south of Greenville.

By Mr. Gardner: We wish to introduce this map and have it identified as exhibit number two to the testimony of Mr. Rigby.

(It is so identified by the Stenographer.)

[fol. 41] By Mr. Easterling:

Q. Mr. Rigby, you say you have 169 miles of railroad?

A. It is actually 167.7 main line that we operate.

Q. The Interstate Commerce Commission shows the line is a distance of 179 miles and a fraction, and 110 miles that is leased to the Southern?

A. Yes, sir.

Q. Could you tell me if the Columbus & Greenville Railroad Company asked to have a valuation fixed upon the road of $6,948,549.00, and divide, that by the number of miles in the road as given by the Interstate Commerce Commission of 179 miles, what valuation would that give you per mile?

A. I couldn't say.

Q. You can figure it out, can't you; divide that; it won't take but a minute and see what it is?

Objection. Ruling reserved.

Q. Divide that by the total mileage of 179 miles, the valuation of $6,948,549.00 and what that will be?

A. 3882.

Q. That would be $38,000.00, wouldn't it?

Q. For each mile, practically?

A. Yes, sir.

Q. The Interstate Commerce Commission valued your road at $4,470,534.00, and if you divide that by 179, the

number of miles of road, that would give you about $24,400.00 per mile, wouldn't it?

A. I haven't figures for that.

Q. You testified while ago that your chief danger from the levee was if it broke north of Greenville. State if it isn't a fact that if the levee would break fifteen or twenty miles south of Greenville and the water would be as high as it was in 1927, if it would flood both sides of your road-[fol. 42] bed?

A. The back water might reach there.

Q. Your road would be affected by the back water coming up the streams, wouldn't it?

A. Yes, sir.

Q. That is the way it goes, coming up the streams?

A. Yes, sir.

By Mr. Gardner:

Q. Would it affect the railroad?

A. If the water covered it as it did in 1927 it would.

By Mr. Easterling:

Q. It would flood the entire track on both sides?

A. I don't know that it would reach it. A break fifteen or twenty miles south of Greenville, I don't know that it would reach Greenville; we have never had any experience of that kind.

Q. You do know that in 1927 when the levee broke about eighteen miles north of Greenville that the bulk of the water came down that bayou that runs through Leland, did it not?

A. Considerable of it did.

Q. It came out at an angle?

A. Yes, sir.

Q. Judging it by the height of the water in 1927 you do know that the levee breaking north of Greenville, eighteen miles north, that your entire road bed was covered with high water in 1927?

A. Yes, sir.

Q. And of course if the water would flood the road bed on either side it would interfere with your carrying passengers and freight?

A. It wouldn't check the travel unless it would wash out a trestle.

[fol. 43] Q. And the water going in the low places would endanger doing what you would do?

A. Yes, sir.

Q. Even the Y. & M. V. tracks were under in a good many places in 1927, were they not?

A. Yes, sir.

Q. Do you pay taxes in the delta?

A. No, sir.

Q. You don't live over there?

A. No, sir.

Q. You don't know what taxes are imposed over there?

A. No, I do not.

Q. You take an ordinary farm in the delta, say 600 acres, that we will say is worth $50.00 an acre, $30,000.00, do you know about how much cotton they produce per acre in the delta?

A. No, sir.

Q. Do you spend most of your time in the delta?

A. No, sir.

Q. You have supervision of the track?

A. Yes, sir.

Q. You all haul a good deal of cotton through?

A. Yes, sir, we handle more in the delta.

Q. Does your railroad collect the cotton tax imposed on cotton?

A. I don't have anything to do with that.

Q. You do know your railroad collects the tax?

A. I don't know, I think so.

By Mr. Gardner:

Q. Now the break in 1927, how far was the delta overflowed north of that break; would you say any land north of the break overflowed?

A. I don't think so, not north of it.

[fol. 44] Q. If a break should occur fifteen miles below Greenville would it effect your railroad fifteen miles north of it?

A. I don't know that it would.

Q. Now the break in 1927, tell the court how far that break effected the lands north of the break, didn't the water all go south?

A. It went south.

Q. It didn't effect any of the lands north of it?

A. Not that I know of, not over 100 yards.

Q. These freight cars you were asked about just now, tell the court how these cars were bought, any cash paid at all?

A. I don't know, Mr. Gardner, I didn't handle that matter.

Q. As a matter of fact, they were bought on a credit, weren't they?

A. I think so.

By Mr. Easterling:

Q. He was asking you about the overflow north of the break; isn't it a fact that all of the low places and bayous were swollen up north of the break?

A. I don't know, I wasn't north of Benoit.

By Mr. Gardner:

Q. Benoit was above the break?

A. Yes, sir.

Q. And that was not overflowed?

A. No, sir.

Q. Wasn't overflowed there?

A. No, sir.

By Mr. Easterling:

Q. Do you know whether that was high land there at Benoit or whether it was in a valley?

A. I couldn't say, it is about like all delta country.

[fol. 45] By Mr. Gardner:

Q. And none of it was overflowed?

A. No, sir.

Q. You don't know whether those freight cars—to the best of your information were those freight cars paid for cash or bought on credit?

A. I don't know.

Q. You don't know?

A. No, sir.

Q. That's all.

(Witness excused.)

Court here recessed from twelve o'clock, A. M. to one o'clock P. M., and thereupon the following proceedings were further had, to-wit:

[fol. 46] Z. P. Hawkins, being produced as a witness for the defendant, after first being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Gardner:

Q. Mr. Hawkins, what are your initials?
A. Z. P.
Q. Where do you live?
A. Winona.
Q. What is your occupation?
A. I am assistant freight agent of the Columbus & Greenville Railway Company.
Q. Now, Mr. Hawkins, Mr. Rigby was asked this morning by counsel on the other side about the purchase of 300 box cars by the Columbus & Greenville Railroad Company; state whether or not you know anything about that purchase?
A. Yes, sir.
Q. When were those cars purchased?
A. Sometime during the last three months.
Q. By what authority?
A. By authority of the finance docket of the Interstate Commerce Commission.
Q. How much do those cars cost?
A. $570,000.00.
Q. Were they bought for cash or on a credit?
A. The title of the cars is not to invest in the Columbus & Greenville Railwaq Company until they are paid for.
Q. Each car is placarded to that effect?
A. Yes, sir.

By Mr. Easterling: We object to all this testimony as incompetent, irrelevant and immaterial.

[fol. 47] Ruling reserved.

By Mr. Gardner:

Q. What is the capital stock of the Columbus & Greenville Railway Company?

A. One hundred thousand dollars.

Q. What is the capital stock of the Y. & M. V.?

A. I understand that the capital stock of the Y. & M. V. is twenty five million dollars.

Q. Do you know whether the stock of the Columbus & Greenville Railway Company has any value?

A. No, sir.

Q. Can you buy any stock of the Y. & M. V.?

A. It is my understanding you can't buy it at any price.

Q. Have you had any experience with overflows on the Mississippi River?

A. Yes, sir, in Tensas Parrish in Louisiana about ten miles from the river.

Q. When was that, during a break of the Mississippi River?

A. Yes, sir.

Q. Yell the court how that break effected the land north of the break, the water?

Objection. Ruling reserved.

A. The break in this instance was below a place owned by my father down there, and it didn't effect our place, it was below that, our place was north of the break.

Q. How far north?

A. I will say between seven and ten miles.

Q. How close did the water come to your place?

A. It was probably six miles below us.

Q. In other words, the water didn't back up more than a mile from the break, north of the break?

A. A mile or a mile and a half.

[fol. 48] Q. Do you know how far the Y. & M. V. Railroad ran their trains during the break of 1927?

A. Yes, sir, the trains ran to Benoit.

Q. That was two miles north of this break in 1927?

A. Yes, sir.

Q. This overflow of 1927 didn't effect the operation of the trains down to Benoit?

A. No, sir.

Q. Take the witness.

Cross-examination.

By Mr. Easterling:

Q. Isn't it a fact that the land is higher near the levee than it is further east, and the drainage extends east and south?

A. I couldn't say, I don't know about that.

Q. Benoit is close to the levee, is it not? State of your own knowledge, if you know, whether or not when that break occured in 1927 if the water did not fill all the bayous and sloughs and even the Yazoo River and cause it to fill up its banks?

A. I don't know, I couldn't say; I will say that it did not effect the operations of the railroads from Benoit north.

Q. Benoit, that is—Benoit is right close to the levee, is it not?

A. Yes, sir.

Q. You won't attempt to tell the court if it didn't north of Leland, that low strip of country, you won't tell the court that land didn't go under during the break, will you?

A. No, I wouldn't say.

Q. You wouldn't say it did not in the low places?

A. No, sir.

[fol. 49] Q. Are you familiar with the delta section of this road?

A. Yes, sir, fairly well.

Q. Do you know—You are an assistant auditor?

A. No, sir, I am the assistant general freight agent.

Q. Do you know anything about the income your company has made in the last three years, 1925, 1926, 1927 and 1928?

A. No, sir, my duties don't require me to work with income or expenditures, I don't know anything about it.

Q. Well, all you know about it is they bought the box cars?

A. I know they bought the box cars.

Q. If the capital stock of the road was a hundred thousand dollars, if in 1925 the company made eighty five thousand dollars profit, and a hundred and fifty nine thousand dollars profit in 1926, and a hundred and five thousand dollars profit in 1927; for 1926, it would have taken in in income of that year more than one and one half times the capital stock, would it not?

A. If its net income for 1926 was one hundred and fifty nine thousand dollars and its capital stock was one hundred thousand dollars, it would.

Q. It would be pretty good stock looks like, it would, would it not?

A. Yes, sir.

By Mr. Easterling: I am going to offer this certificate as Exhibit number one to Mr. Hawkins evidence.

(It is so identified by the stenographer.)

By Mr. Easterling:

Q. In order to get permission to buy the box cars you had to take that up with the Interstate Commerce Commission?

A. Yes, sir.

Q. The rates you charge for freight is based on tariffs [fol. 50] promulgated by the Interstate Commerce Commission?

A. No, sir.

Q. For interstate shipments of freight where you handle freight on part haul, where it goes through, don't you get a pro rata part of the freight?

A. Yes, sir.

Q. And your rates in Mississippi are fixed by the railroad commission?

A. Yes, sir.

Q. But the Interstate Commerce Commission has to give you authority to buy cars?

A. Yes, sir.

By Mr. Easterling: I want to introduce this phamp-let got out by the Southern Railway Company in Mississippi.

Objection. Ruling reserved.

(It is identified by the Stenographer as exhibit number two to the testimony of the witness.)

Q. Do you know anything about the valuation fixed on your railroad by the Interstate Commerce Commission?

A. No, sir.

Q. Nothing about that at all?

A. No, sir.

By Mr. Gardner:

Q. You don't know what the bonded indebtedness in 1924 and 1925 was, do you?

A. I know nothing about the bonded indebtedness—you mean of the Southern Railway Company?

Q. Yes.

A. I know nothing about that.

Q. That's all.

(Witness excused.)

[fol. 51] By Mr. Gardner: We introduce the assessment of the State Tax Commission of the Y. & M. V. Railroad and of the Columbus & Greenville Railway Company for the years 1926, 1927 and 1928.

(It is identified by the Stenographer as Exhibit "A.")

By Mr. Easterling: We object to the introduction of the foregoing for the reason that the tax sued for in this case is not an ad valorem tax but a tax for benefits, and because the same is incompetent, immaterial and irrelevant in this suit.

By the Court: The ruling is reserved:

By Mr. Gardner: We introduce the certified copy of the classification of the railroads for the purpose of levying privilege taxes for the years 1926 and 1927.

(It is identified by the Stenographer as Exhibit "B".)

By Mr. Easterling: Plaintiff objects to the introduction of the foregoing as being a classification for state privilege license by the Mississippi Railroad Commission, and it is incompetent, irrelavant and immaterial.

Ruling of the court is reserved.

Defendant rests.

[fol. 52] Thereupon the plaintiff offered the following evidence, rebuttal, to-wit:

L. F. Easterling, being produced as a witness for the plaintiff, after first being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Canizarro:

Q. What is your name, please?

A. L. F. Easterling.

Q. Judge, what profession do you follow?

A. I am a lawyer and also have been operating a plantation for a good many years—by proxy.

Q. Where is your plantation located, Judge?

A. In Washington County on Lake Washington.

Q. That is within the levee district?

A. Yes, sir.

Q. How many acres of land do you own?

A. Well, approximately—the deed calls for 605 acres and maybe a little more around the margin of the lake, low lands.

Q. What do you value that property at, about, in round figures?

A. Well, I don't know what I value it at; I haven't been able to sell it in a good many years, and I still owe somewhere maybe thirty-eight to forty dollars an acre on it, have been paying on it about nine years.

Q. What is it worth about?

A. Well, it is hard to form an idea; the value depends on what somebody else will pay; I pay $75.00 an acre for it.

Q. What would you take for it today?

[fol. 53] Objection. Sustained. Exceptions.

Q. What have you been offered for it?

A. I will say the way the market is selling now it would be worth around fifty five or six dollars an acre, about what I think the market is.

Q. How much have you been offered for your place?

A. Well, I don't know whether you call it an offer or not but I would say that the value would be somewhere around thirty thousand dollars, I might get that.

Q. In normal conditions how many bales of cotton can you raise on that farm, Judge.

A. Well, I haven't worked all of it; some years work 225 or 250 acres in cotton maybe, have the other in meadow and pasture.

Q. I will ask you how many bales of cotton you can raise on that farm under normal circumstances?

A. It will raise from three quarters to a half a bale per acre, and some of it a bale, it depends on how the land is worked and the situation and so forth; this year I have got in about 225 acres and will get about 125 bales.

Q. I want to ask you this question: In addition to the state and county tax, state to the court what levee tax are you paying on that property?

Objection as incompetent. Ruling reserved.

A. I pay just like all other property owners, it is fixed by law, an acreage tax.

Q. How much is that?

A. I don't know what it is this year, it has been five cents an acre, and for the 600 acres would be $30.00; then we pay a cotton tax, it varies each year, in the last seven or eight years it has been $1.50 a bale, and now it is a dollar a bale, and it has been $1.25 a bale.

[fol. 54] Q. You are paying $1.50 a bale on 200 bales of cotton, if you pay that it will amount to what sum?

A. If I raised 200 bales and paid $1.50 a bale it would be $300.00, and I don't know what it is this year, I think last year it was so much a hundred pounds, twenty cents a hundred, isn't it, Judge?

By the Court: Yes, it was last year.

By Mr. Canizarro:

Q. You are paying an ad valorem tax in addition to that?

A. Yes, sir, five mills and four mills.

Q. Do you know what it was in 1926?

A. I think it was four mills in 1926, five mills I think in 1927, if I am not mistaken, I don't remember exactly, four or five mills, and it has been eight in years back, may be higher.

Q. Judge, if you had your entire 600 acres planted in cotton could you get as much as 400 bales of cotton?

A. A normal year I expect it would make it; under ordinary circumstances you would average from a half to three quarters of a bale to the acre.

Q. The cotton tax in that instance would amount to about $600.00?

A. It would amount to whatever the tax was a bale, if it was a dollar a bale and make 300 bales it would be $300.

Q. I am not going to ask you if you have made any money planting cotton?

A. I think that would be a pregnant negative, Judge.

Q. You will have to pay that tax whether you make any gains or whether you lose?

A. They never consult me about whether I make any profit on the cotton, I pay the tax whether I lose or win.

[fol. 55] Q. So under normal conditions if you planted your entire 600 acres and made 400 bales of cotton you tax will amount to over $650.00 per year, wouldn't it?

A. At $1.50 per bale it would?

Q. On a thirty thousand valuation?

A. Yes sir.

Q. Judge, do you know of your own knowledge whether other plantation owners in the levee district make as much as 400 or 500 bales of cotton on 600 acres?

A. Oh yes, it depends on the degree of cultivation and the tenants they have; the delta makes very good crops where the land is worked, has in the last three or four years where you have sufficient tenants to work the land.

Q. You haven't had the Interstate Commerce Commission to give you the privilege of raising the price of cotton, have you, Judge?

A. I wish they would.

Q. Judge, tell the court of your own knowledge is that the general condition that exists in the levee district in the delta in regard to taxation?

A. Well, my general knowledge of course is everybody pays these three taxes, the advalorem tax, the cotton tax and the acreage tax.

Q. Any cotton shioped out of the delta, the railroad is liable and it is a penalty for anybody to try and ship cotton without paying the tax?

A. Yes, sir.

Q. That's all.

Cross-examination.

By Mr. Gardner:

Q. You haven't made any money farming, have you?

A. I won't truthfully say I can, it isn't all out of the field [fol. 56] yet.

Q. Take my advice and join the cotton association.
A. I belong to it.
Q. That's all.

Witness excused.
Plaintiff rests.
Defendant rests.

By the Court: The court now passing on the objections of plaintiff wherein the ruling was reserved heretofore sustains the objections of the plaintiff, and as to the objections of the defendant, same are overruled.

To which action and ruling of the court the defendant the Columbus & Greenville Railway Company then and there duly and legally excepted.

[fol. 57] STENOGRAPHER'S CERTIFICATE

I, W. W. De Loach, Official Court Stepographer of and for the Fifth Judicial District of Mississippi, do hereby certify that the above and foregoing thirty-seven pages in the cause styled as shown on the caption hereof, constitute and contain a full, true and correct copy of my original stenographic notes as taken by me on the trial of said cause, and that I reported all testimony, objections and exceptions of counsel and rulings of the court to the very best of my skill and ability as a stenographer.

I further certify that I have this day forwarded by express prepaid one carbon and one original copy of said transcript to F. M. Wingate, Clerk of the Circuit Court of Montgomery County, at Winona, Mississippi, and that I have notified all counsel of record in said cause of the completion and filing of said transcript with said clerk.

Witness my signature on this October 23rd, 1929.

W. W. De Loach, Official Stenographer.

[fol. 58] EXHIBIT

Mississippi Railroad Commission

Jackson, Miss.

Docket No. 5897

Classification of Railroads.

Section 3856 of the Code of 1906, as amended, requires that the Mississippi Railroad Commission shall, annually, on or before the first Monday in August, classify the several railroads doing business in the State of Mississippi for the purpose of levying a privilege tax.

It is therefore ordered, That the several railroads doing business in the State be classified for the purpose of levying privilege taxes for the fiscal year 1926-27, as follows: Viz.:

Name of railroad	Class
Illinois Central R. R., Main line	1
Miss. Ala. Branch	2
C. A. & N. Branch	2
Meridian, Brookhaven & Natchez	3
B'Haven & Monticello	3
Other Branches	3
Yazoo & Mississippi Valley Railroad, Main line	1
Lake Cormorant-Gwin-Asylum	1
Leland-Greenville	1
Rosedale to Dockery	2
Lambert via Ruleville Branch	2
Clarksdale to Swan Lake Branch	2
Gwin to Durant, Parsons-Grenada	2
Natchez to Jackson Branch	2
All other Branch Lines	3
Mobile & Ohio R. R., Main lines	1
Branch lines	3
Southern Railway, Memphis & Charleston	1
Alabama Great Southern	1
New Orleans and Northeastern	1
Okolona Branch	3
Columbus & Greenville Railway, Main line	3
Branch lines	3

	Class
Alabama & Vicksburg Ry	1
Louisville & Nashville R. R.	1
Kansas City, Memphis & Birmingham, Main line	1
Branch lines	2
Gulf & Ship Island, Main line	2
Laurel Branch	3
Columbia Branch	3
Gulf, Mobile & Northern R. R., Main line	2
Branch lines	3
Mississippi Central R. R.	3
Fernwood, Columbia & Gulf	3
Natchez & Southern R. R	3
Natchez, Columbia & Mobile R. R	3
Miss. & Alabama R. R	3
[fol. 59] Mississippi Export R. R. Co	3
Batesville, Southwestern R. R	3
Chicora Northwestern	3
Meridian & Memphis R. R	3
Mississippi Eastern R. R	3
Sardis & Delta R. R	3
De Kalb & Western R. R	3
Pearl River Valley R. R	3
Kosciusko & Southeastern R. R	3
Mississippi & Western R. R	3
Jackson & Eastern R. R	3
Itta Bena & Belzoni R. R	3
Mississippi Southern R. R	3
Memphis & Lake View R. R	3
Gulfport Miss. Coast Traction Co	3
New Orleans Great Northern R. R	2
Mississippian Railway	3
Bonhomie & Hattiesburg Southern R. R. Co	3
Itta Bena, Schlater & Minter City R. R. Co	3

O. B. Quin, Jr., Secretary.

I, J. W. Williams, Secretary of the Mississippi Railroad Commission, hereby certify that the foregoing is a true and correct copy of classification of railroads for the purpose of levying privilege tax for the fiscal year 1926-1927, as recorded in Minute Book 9, pages 167 and 168 of the records

of this office, said classification having been made on Monday, August 2, 1926.

Witness my hand and Official Seal of the Mississippi Railroad Commission, on this the 10th. day of October, A. D., 1929.

J. W. Williams, Secretary Miss. Railroad Commission.

[fol. 60] EXHIBIT NO. ONE

I, Ernest Kellner, Secretary-Treasurer and Custodian of the Records, do hereby certify that the Columbus and Greenville Railway Company paid into the Treasury of the Board of Mississippi Levee Commissioners on October 16th, 1926, the sum of $920.50, same being railroad mileage tax for the fiscal year 1925-1926; and

That they paid the sum of $920.50 on October 27th, 1927, same being railroad mileage tax for the fiscal year 1926-1927; and

That they paid the sum of $368.20 on October 31st, 1928, same being railroad mileage tax for the fiscal year 1927-1928. As shown by the records and Cash Journal of the Board of Mississippi Levee Commissioners.

Witness my hand and official seal of this Board this the 14th day of October, 1929.

Ernest Kellner, Secretary and Treasurer and Custodian of the Records.

[fol. 61] EXHIBIT ONE TO Z. P. HAWKINS

STATE OF MISSISSIPPI,
County of Hinds:

I, J. W. Williams, Secretary of the Mississippi Railroad Commissioner, do hereby certify that the "Income balance transferred to Profit and Loss" as shown on pages 301 of the Annual reports of the Columbus & Greenville Railway Company, as filed by said railway company through its proper officers, i. e. A. T. Stovall, President and J. L. Mea-

dows, Auditor for years 1925, 1926 and 1927, is as follows, to-wit:

1925	$85,124.05 Cr.
1926	159,392.98 Cr.
1927	105,145.07 Cr.

Said annual reports being a part of the records of this office of which I am the proper custodian.

Witness my hand and the official Seal of the Mississippi Railroad Commission on this the 15th. day of October, A. D., 1929.

J. W. Williams, Secretary (Seal.)

[fol. 62] In Circuit Court of Montgomery County

[Title omitted]

Agreement re Exhibits.—Filed Nov. 13, 1929

It is agreed by counsel representing appellant and appellee that the original assessment of the State Tax Commission of the Yazoo & Mississippi Valley Railroad Company and of the Columbus & Greenville Railway Company for the years 1926, 1927 and 1928, and also the certified copy of the classification of railroads for the purpose of privilege taxes for the years 1926 and 1927, made by the Railroad Commission, and also the original railroad map of the State of Mississippi, made by the Railroad Commission, all of which were introduced in evidence by appellant, may be sent up to the Supreme Court, in lieu of being copied in the record in this cause, said originals to be used in connection with, and considered a part of, the record on appeal in said cause, free of all objections, except those made in the lower court, as shown by the record.

Witness our hands this the 7th day of November, 1929.

Gardner, Odom & Gardner, Attorneys for Appellant. Franklin, Easterling & Rosenthal, Attorneys for Appellee.

[File endorsement omitted.]

[fol. 63] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 64] Bond on appeal for $25,000, approved November, 1929, omitted in printing.

[fol. 65] Caption, in usual form, showing service on Franklin, Easterling & Rosenthal, filed December 21, 1929, omitted in printing.

[fol. 66] IN SUPREME COURT OF MISSISSIPPI

No. 28555

COLUMBUS & GREENVILLE RAILWAY CO., Appellant,

vs.

W. J. MILLER, State Tax Collector, Appellee

ASSIGNMENT OF ERROR—Filed Dec. 23, 1929

Comes the Columbus & Greenville Railway Company and complains of a judgment rendered against it in the Circuit Court of Montgomery County, Mississippi, in the above entitled cause, and having demanded an appeal to this court, assigns the following error:

(1). The Circuit Court of Montgomery County, Mississippi, committed error in failing and refusing to render a judgment in favor of the appellant.

(2). The Circuit Court of Montgomery County, Mississippi, committed error in rendering a judgment against the appellant.

(3). The Circuit Court of Montgomery County, Mississippi, committed error in rendering the judgment which it rendered.

(4). The Circuit Court of Montgomery County, Mississippi, committed error in holding and adjudicating that

Chapter 259 of the Mississippi Laws of 1926 violated the Fourteenth Amendment to the Constitution of the United States, in that the same deprived appellee and, or the residents of the Levee District of their property without due process of the law and denied to them the equal protection of the law, said Chapter containing the following language:

(That for the purpose of contributing to the expense of building, maintaining and repairing levees in the Mississippi Levee District, and of paying the debts and liabilities incurred thereof, by the board of Mississippi [fol. 67] levee commissioners, the following tax is hereby levied and assessed upon all railroads and parts of railroads lying and situated in the said levee district, to-wit: Upon each and every mile of the main or trunk line of all broad or standard gauge railroads, not including side tracks or switches, the sum of $350.00 per annum; upon each and every mile of narrow gauge railroad or railroads of less width than standard gauge, not including side tracks or switches, the sum of $87.50 per annum; and upon each and every mile of broad or standard gauge railroads, not used and operated as a main or trunk line, but constituting and used as a feeder to or a branch of a main or trunk line, or to connect such main or trunk line with some other system, the sum of $210.00 per annum; provided, that no railroad or branch railroad shall be subject to taxation, under this act while the same is in process of construction, but if any part hereof shall be used for profit, that part so used shall be taxed, although the whole of said railroad or branch may not be finished; provided further that the tax per mile per annum on the main line of any railroad company which does not own in excess of twenty-five miles of railroad in the Mississippi levee district shall be $50.00 per annum."

(5) The Circuit Court of Montgomery County, Mississippi, committed error in holding valid and as non-violative of the Fourteenth Amendment to the Constitution of the United States Chapter 282 of the Mississippi Laws of 1914, said Chapter being in the following language:

"Section 1. Be it enacted by the Legislature of the State of Mississippi that Chapter 125 of the Acts of 1908 be and the same is hereby amended so as to read as follows:

"That Chapter 7 of the Acts of 1886 be and the same is hereby amended so as to read as follows:

"That for the purpose of contributing to the expense [fol. 68] of building, maintaining and repairing levees in the Mississippi Levee District, and of paying the debts and liabilities incurred therefor, by the board of Mississippi Levee Commissioners, the following tax is hereby levied and assessed upon all railroads and parts of railroads lying and situated in the said levee district, to-wit: Upon each and every mile of the main or trunk line of all broad or standard gauge railroads, not including side tracks or switches, the sum of $350.00 per annum; upon each and every mile of narrow gauge railroad or railroads of less width than standard gauge, not including side tracks or switches, the sum of $87.50 per annum; and upon each and every mile of broad or standard gauge railroads, not used and operated as a main or trunk line, but constituting and used as a feeder to a branch of a main or trunk line with some other system, the sum of $210.00 per annum; provided, that no railroad or branch railroad shall be subject to taxation under this act while the same is in process of construction, but if any part thereof shall be used for profit, that part so used shall be taxed, although the whole of said railroad or branch may not be finished.

"Sec. 2. That said taxes shall be paid by the person or corporation owning or operating said railroads to the treasurer of said Mississippi Levee District on or before the first day of November in each year; but upon roads hereafter constructed such tax be payable in one year, only upon so much of said railroads as shall have been used for profit prior to the first day of February in that year.

"Sec. 3. That if said tax is not paid when due, that ten per cent. damages shall accrue thereon, and upon affidavit filed with the circuit court clerk of Washington County, by the treasurer of the board of Mississippi Levee Commissioners, stating the amount of tax due and unpaid and the railroad in default, said Clerk shall issue a writ to the sheriff of Washington County or to the sheriff of such other county in said levee district as may be necessary, [fol. 69] stating in such writ the amount of tax due and

the damages thereon, and directing said sheriff to sell so much of said railroad as may be in his county, in the same manner, at the same place and upon the same notice and terms as is prescribed by law for sale of real estate under execution, for the tax and costs due on said railroad, and said sheriff shall forthwith pay over the amount so collected to the treasurer of said levee board, and shall execute a deed to the purchaser and at once place him in possession of said railroad.

"'Sec. 4. That whenever, under the power conferred by law upon said board of levee commissioners, any reduction is made in their other taxes, then said board shall make a proportional reduction in the taxes assessed by this act for that year, and shall notify the railroad company or other person operating said railroad of such reduction.

"Sec. 5. That this act take effect and be in force from and after its passage.'"

(6) Chapter 282 Mississippi Laws of 1914, as construed by the court in this case, violates the Fourteenth Amendment to the Constitution of the United States, in that the same deprives appellant of its property without due process of law and denies to it the equal protection of the law.

(7) Section 236 of the Constitution of the State of Mississippi, being in the following language:

"Section 236. The legislature shall impose for levee purposes, in addition to the levee taxes heretofore levied or authorized by law, a uniform tax of not less than two nor more than five cents an acre per annum upon every acre of land now or hereafter embraced within the limits of either or both of said levee districts. The taxes so derived shall be paid into the treasury of the levee board of the district in which the land charged with the same is situated; and the legislature, by the act imposing said tax, shall authorize said levee boards to fix the annual rate of taxation per acre within the limits aforesaid, and thereby require said [fol. 70] levee boards, whenever a reduction is made by them in their other taxes, to make a proportionate reduction in the acreage tax hereinbefore mentioned; but said acreage tax shall not be reduced below two cents an acre

per annum; and all reductions in such taxation shall be uniform in each of said districts; but the rate of taxation need not be the same in both of them; and such specific taxes shall be assessed on the same assessment roll, and collected under the same penalties, as the ad valorem taxes for levee purposes, and shall be paid at the same time with the latter. And no levee board shall every be permitted to buy lands when sold for taxes; but the state shall have a prior lien for taxes due thereto. The legislature may provide for the discontinuance of the tax on cotton, but not in such manner as to affect outstanding bonds based on it, and on the discontinuance of the tax on cotton, shall impose another tax in lieu thereof; but the legislature may repeal the acreage tax required to be levied hereby after the first day of January, A. D., 1895", as construed and enforced by the Circuit Court of Montgomery County, Mississippi, in this case, violates the Fourteenth Amendment to the Constitution of the United States, in that the same deprives appellant of its property without due process of law, and denies to it the equal protection of the law.

(8) Section 112 of the Mississippi State Constitution, which is in the following language:

"Section 112. Taxation shall be uniform and equal throughout the state. Property shall be taxed in proportion to its value. The legislature may, however, impose a tax per capita upon such domestic animals as from their nature and habits are destructive of other property. Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value. But the legis- [fol. 71] lature may provide for a special mode of valuation and assessment for railroads, and railroad and other corporate property, or for particular species of property belonging to persons, corporations or associations not wholly situated in one county. But all such property shall be assessed at its true value, and no county shall be denied the right to levy county and special taxes upon such assessment as in other cases of property situated and assessed in the county", as construed and enforced in this case, violates the Fourteenth Amendment to the Constitution of the United States, in that it deprives appellant of its prop-

erty without due process of the law, and denies to it the equal protection of the law.

(9) Other causes to be shown at the hearing.

Gardner, Odom & Gardner, Watkins, Watkins & Eager, Attorneys for the Appellant.

I, William H. Watkins, one of the attorneys for the appellant in the above-entitled cause, have this day mailed to Messrs. Franklin, Easterling & Rosenthal, Attorneys at Law, Jackson, Mississippi, by United States mail, postage prepaid, a true and correct copy of the foregoing assignment of error. This the 21 day of December, 1929.

W. H. Watkins, of Counsel.

[File endorsement omitted.]

[fol. 72] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

ORDER PERMITTING FILING OF SUPPLEMENTAL ASSIGNMENT ERRORS—Mar. 24, 1930

It is ordered that the appellant be and he is hereby permitted to file, as of February 12th, 1930, its supplemental assignment of errors with the same effect as if filed with the original assignment of errors.

[fol. 73] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

SUPPLEMENTAL ASSIGNMENT OF ERROR—Filed Feb. 12, 1930

Comes the Columbus & Greenville Railway Company, and, in addition to the errors heretofore assigned to the action of the Circuit Court of Montgomery County, Mississippi, at the trial of the above-entitled cause, upon which errors the appellant relies for the reversal of the

judgment entered against it in the above-entitled cause, assigns the following additional errors:

(1) The Circuit Court of Montgomery County, Mississippi, committed error in admitting, over the objection of the appellant, testimony of R. C. Frazier and L. P. Smith, or either of them, in respect to the publication of Chapter 259, Mississippi Laws of 1926, in a newspaper in Washington County, Mississippi.

(2) The said Circuit Court committed error in excluding the testimony of J. H. Rigby in respect to the condition of the property of the appellant company as compared with that of the Yazoo & Mississippi Valley Railroad Company, and committed error in excluding the testimony of J. H. Rigby in respect to the condition of the physical properties of the appellant company, and committed error in excluding the testimony of J. H. Rigby in respect to the comparative benefits accruing to the Columbus & Greenville Railway Company and the Yazoo & Mississippi Valley Railroad Company by reason of the Levee District, and committed error in excluding the testimony of J. H. Rigby in respect to the lack of advantages and the dissimilarity in the situation and condition of the appellant railway com-
[fol. 74] pany and any other railroad company running at right angles to the Mississippi River, and in excluding the testimony of J. H. Rigby as to the general situation, location and lack of equal advantages accruing to the appellant railway company or any other railroad company entering the Levee District and coming into Greenville, Mississippi, from an easterly direction, as shown Tr. 5-26.

(3) Said circuit court committed error in excluding, at the instance of the appellee, the testimony of Z. P. Hawkins to the same effect as the last above mentioned testimony. Tr. 27-31.

(4) The said Circuit Court committed error in excluding, at the instance of the appellee, the assessment of the State Tax Commission against the Yazoo & Mississippi Valley Railroad Company and the Columbus & Greenville Railway Company for the years 1926, 1927 and 1928.

(5) The said Circuit Court committed error in excluding, at the instance of the appellee, testimony consisting of

the classification of railroads for the purpose of levying privilege taxes for the years 1926 and 1927 and Railroad Commission Map of Mississippi.

(6) Other causes to be shown at the hearing.

Gardner, Odom & Gardner, Watkins, Watkins & Eager, Attorneys for the Appellant.

I, William H. Watkins, one of the solicitors for the appellant in the above entitled cause, certify that I have this day served copy of the foregoing supplemental assignment of error on the appellee by mailing a copy thereof, postage prepaid, to Messrs Franklin, Easterling & Rosenthal, Attorneys at Law, Jackson, Mississippi.

This the 12th day of February, 1930.

W. H. Watkins, of Counsel.

[File endorsement omitted.]

[fol. 75] Minute entry of argument and submission March 25, 1930, omitted in printing.

[fol. 76] In Supreme Court of Mississippi

No. 28555

Columbus & Greenville Railway Company

vs.

W. J. Miller, State Tax Collector for the Use and Benefit of the Mississippi Levee District

Judgment—April 21, 1930

This cause having been submitted on a former day of this term on the record herein from the Circuit Court of Montgomery County and this court having sufficiently examined and considered the same and being of opinion that there is no error therein, doth order and adjudge that the judgment of said Circuit Court rendered in this cause at the October Term, 1929, on October 17th, 1929, be and the

same is hereby affirmed and that the appellee do have and recover of and from appellant and of A. F. Gardner and A. T. Stovall, sureties in the appeal bond the sum of Twelve Thousand, One Hundred and Fifty and 60/100 Dollars with interest on said sum at 6 per centum per annum from July 31st 1928 to October 17th, 1929, amounting to the sum of Sixteen Hundred and Twelve and 01/100 Dollars, making a total of Thirteen Thousand, Seven Hundred and Sixty Two and 61/100 Dollars together with the further sum of Six Hundred and Eighty Eight and 13/100 Dollars, being damages at the rate of 5 per centum as allowed by law as well as interest on the amount of said judgment from date of rendition in the court below until paid at the rate of 6 per centum per annum and also the costs of this cause in this court and in the court below, to be taxed, etc.

[fol. 76½] IN SUPREME COURT OF MISSISSIPPI, DIVISION A

28555

COLUMBUS & GREENVILLE RAILROAD CO.

vs.

W. J. MILLER, State Tax Collector

OPINION—Filed April 2, 1930

SMITH, C. J.:

This case is ruled by the opinion rendered on the former appeal herein (154 Miss. 317, 122 So. 366), to which we adhere; and the evidence excluded, if competent, as to which we express no opinion, could not have changed the result.

Affirmed.

[File endorsement omitted.]

[fol. 77] Valuation Docket No. 191

SOUTHERN RAILWAY COMPANY IN MISSISSIPPI.

Submitted June 20, 1923. Decided July 11, 1924.

Extract from said Pamphlet as Requested by Appellant.

1. Protest of the Southern Railway Company in Mississippi against the tentative valuation of its property considered and determined.

2. Final value of the property of the Southern Railway Company in Mississippi, owned and used for common-carrier purposes, as of June 30, 1915, found to be $4,470,534, and used but not owned $194,511.

C. O. Amonette for Southern Railway Company in Mississippi.

Ralph H. Kimball for Western Union Telegraph Company.

REPORT OF COMMISSION

Division 1, Commissioners McChord, Meyer, Aitchison, and Lewis.

By DIVISION 1:

A tentative valuation, as of June 30, 1915, of the property of the Southern Railway Company in Mississippi, hereinafter called the carrier, was completed and notice thereof, dated January 21, 1922, was given to the carrier and other interested parties. The carrier filed a protest within the statutory period. A protest was filed by the Southern Railway Company against the valuation of equipment owned by it and leased to the carrier. On January 12, 1923, the Western Union Telegraph Company filed a petition that it be made a party to the proceedings. A hearing has been had on the issues presented by the protest of the carrier and briefs have been filed. No testimony was presented by the Southern Railway Company in support of its protest.

On June 30, 1915, the date of the valuation, the carrier owned and operated a line of railroad extending from the

Mississippi-Alabama State line, near Columbus, Miss., to Greenville, Miss., a distance of 179.093 miles. Branches from the main line aggregated 58.353 miles. The carrier also owned 59.508 miles of yard tracks and sidings. All of the railroad had been acquired by purchase. A detailed description of the property of the carrier is given in the order entered herein.

[fol. 78] The protest of the carrier is directed generally against the rules, methods, and principles employed in the preparation of the tentative valuation. Most of the general objections set out in the protest were considered and disposed of in Texas Midland Railroad, 75 I. C. C. 1; Winston-Salem Southbound Railway Co., Id. 187, and Kansas City Southern Railway Co., Id. 223.

The carrier alleged in its protest that the sum of $4,470,534, which we found to be the value of the property wholly owned and used by it, is improperly determined and less than the true value of its properties on date of valuation, which it claims should be $6,948,549. This latter sum is composed of $5,676,039, the carrier's estimate of the cost of reproduction new; $563,322 the present value of lands as reported by us; $616,268, the excess cost of acquisition of land reported by us; and $92,920, the carrier's claim for material and supplies. The carrier claims that if the elements of appreciation, development, organization for operation, and deferred maintenance or depreciation are considered, the value of the properties at date of valuation will be not less than the amount stated above as its claim, although the value claimed is actually built up by adding together the cost of reproduction new without deduction for depreciation, the present value and excess cost of acquisition of carrier lands, and material and supplies.

The report of original and present cost of condemnation and damages or of purchase of lands in excess of such original cost or present value contained in the tentative valuation report will be eliminated from this report, since the valuation act has been so amended as no longer to require this information.

[fol. 79] IN SUPREME COURT OF MISSISSIPPI

No. 28,555

[Title omitted]

PETITION FOR APPEAL—Filed May 23, 1930

To the Honorable Sydney Smith, Chief Justice of the Supreme Court of the State of Mississippi and the presiding judge thereof:

Your petitioners, The Columbus & Greenville Railway Company, a corporation organized and existing under the laws of the State of Mississippi, defendant in the Court below, in the Circuit Court of Montgomery County, Mississippi, and appellant in this Court in the above entitled cause, and A. T. Stovall and A. F. Gardner, sureties on its appeal bond to the Supreme Court of the State of Mississippi in the above entitled cause, in this their petition for an appeal from the final judgment rendered against petitioners by the Supreme Court of the State of Mississippi to the Supreme Court of the United States, respectfully show unto the Court that on the seventeenth day of October, 1929, a judgment was rendered in the above entitled cause in the Circuit Court of Montgomery County, Mississippi, against the petitioner, the Columbus & Greenville Railway Company, in favor of the appellee, W. J. Miller, State Tax Collector, for the use of the Mississippi Levee District, in the sum of thirteen thousand, seven hundred and sixty-two and sixty-one one-hundredths dollars ($13,762.61) with costs of court and interest at the rate of six per centum per annum from the above mentioned date. The petitioner, Columbus & Greenville Railway Company, prosecuted an [fol. 80] appeal from said judgment, rendered in the Circuit Court of Montgomery County, Mississippi, as aforesaid, to the Supreme Court of the State of Mississippi and petitioners, A. T. Stovall and A. F. Gardner, became sureties on it's said appeal bond; and upon the twenty-first day of April, 1930, the judgment rendered by the Circuit Court of Montgomery County, Mississippi, against the Columbus & Greenville Railway Company, as aforesaid, was affirmed and final judgment was rendered upon said date against the Columbus & Greenville Railway Company, and A. T.

Stovall and A. F. Gardner, surety for said judgment with interest, cost and damages; that said judgment rendered by the Supreme Court of the State of Mississippi against the petitioners is now a final judgment of the Supreme Court of the State of Mississippi; and that the said Supreme Court of the State of Mississippi is the highest Court in said State in which a decision in said cause may be rendered; that the Supreme Court of the State of Mississippi, is the highest court of appellate jurisdiction in the State of Mississippi.

Petitioners show unto the Court that in said suit there was brought in question Chapter 282, Mississippi Laws of 1914, as being in conflict with and in violation of Paragraph 1 of the 14th Amendment to the Constitution of the United States in that the Columbus & Greenville Railway Company, appellants, claimed, alleged and asserted that said Chapter 282, Mississippi Laws of 1914, as enforced and construed in this case, violated said Paragraph 1 of the 14th Amendment to the Constitution of the United States in that said statute deprived the said Columbus & Greenville Railway Company, Petitioner, of its property without due process of law and denied to it the equal protection of the law, the said Chapter 282, Mississippi Laws of 1914, being in words and figures as follows, to-wit:

"An act to Amend Chapter 125 of the Acts of 1908, Entitled 'An Act to Amend Chapter 7 of the Acts of 1886, En-
[fol. 81] titled an Act to Provide for the Payment of Levee Taxes by Railroads in the Mississippi Levee District of the State, Approved March 5, 1908.

Mississippi Levee District; Railroad Taxes; Act 1908 Amended

Section 1. Be it enacted by the Legislature of the State of Mississippi, that chapter one hundred and twenty-five of the acts of 1908 be and the same is hereby amended so as to read as follows:

That chapter 7 of the acts of 1886 be and the same is hereby amended so as to read as follows:

That the purpose of contributing to the expense of building, maintaining and repairing levees in the Mis-

sissippi levee district, and of paying the debts and liabilities incurred therefor, by the board of Mississippi levee commissioners, the following tax is hereby levied and assessed upon all railroads and parts of railroads lying and situated in the said levee district, to-wit: Upon each and every mile of the main or trunk line of all broad or standard gauge railroads, not including side tracks or switches, the sum of $350.00 per annum; upon each and every mile of narrow gauge railroad or railroads of less width than standard gauge not including side tracks or switches, the sum of $87.50 per annum; and upon each and every mile of broad or standard gauge railroads, not used and operated as a main or trunk line, but constituting and used as a feeder to a branch of a main or trunk line, or to connect such main or trunk line with some other system, the sum of $210.00 per annum; provided, that no railroad or branch railroad shall be subject to taxation under this act while the same is in process of construction, but if any part thereof shall be used for profit, that part so used shall be taxed, although the whole of said railroad or branch may not be finished.

"Taxes to be Paid Over by Railroad to Treasurer of Levee Board

Sec. 2. That said taxes shall be paid by the person or corporation owning or operating said railroads to the [fol. 82] treasurer of said Mississippi levee district on or before the first day of November in each year; but upon roads hereafter constructed such tax by payable in one year only upon so much of said railroads as shall have been used for profit prior to the first day of February in that year.

"If Taxes Not Paid When Due, Ten per Cent Damages to Accrue

Sec. 3. That if said tax is not paid when due then ten per cent damages shall accrue thereon, and upon affidavit filed with the circuit court clerk of Washington county by the treasurer of the board of Mississippi levee commissioners stating the amount of tax due and unpaid and the railroad in default said clerk shall issue a writ to the sheriff

of Washington county of the sheriff of such other county in said levee district as may be necessary, stating in such writ the amount of tax due of and the damages thereon, and directing said sheriff to sell so much of said railroad as may be in his county, in the same manner, at the same place, and upon the same notice and terms as is prescribed by law for sale of real estate under execution, for the tax and costs due on said railroad, and said sheriff shall forthwith pay over the amount so collected to the treasurer of said levee board, and shall execute a deed to the purchaser and at once place him in possession of said railroad.

"When Board Reduces Other Taxes, Proportionate Reduction to be Made in These Taxes

Sec. 4. That whenever, under the power conferred by law upon said board of levee commissioners, any reduction is made in their other taxes, then said board shall make a proportional reduction in the taxes assessed by this act for that year, and shall notify the railroad company or other person operating said railroad of such reduction.

Sec. 5. That this act take effect and be in force from and after its passage.

Approved February 28, 1914."

[fol. 83] The decision of the said Supreme Court of the State of Mississippi, in its said judgment, heretofore referred to, entered upon the twenty-first day of April, 1930, was in favor of the validity of the said statute of the State of Mississippi, here-in-before referred to; and the Supreme Court of the State of Mississippi, by its said judgment, applied and enforced the statute against the petitioners, in said final judgment, over the claim and assertion of petitioners that said law of the State of Mississippi, as construed and applied, violated Paragraph 1 of the 14th Amendment to the Constitution of the United States, as here-in-before set out.

Your petitioners show unto the Court that in the rendition of said final judgment against said petitioners certain errors were committed to the prejudice of your petitioners, all of which in detail appear in the assignment of errors here-with filed in this cause.

Wherefore your petitioners, feeling aggrieved by the final decision and judgment of the Supreme Court of the State of Mississippi, here-in-before set forth, pray for the allowance and appeal from the judgment of the Supreme Court of the State of Mississippi, with supersedeas as now allowed by law for the correction therein of the errors complained of; and your petitioners present herewith an assignment of errors, to be presented in argument in the Supreme Court of the United States and plaintiffs in error tender herewith their formal and duly executed bond, with good and sufficient sureties joining in the execution of said bond, said bond being conditioned according to law.

Your petitioners pray the approval of said bond and that a transcript of the pleas and proceedings therein, duly authenticated, may be forthwith, in accordance with law, sent to the Supreme Court of the United States. Notice hereof has been duly served upon the attorneys of record for the appellee herein. As in duty bound, your petitioners will ever pray.

[fol. 84] This the 23rd day of May, 1930.

W. H. Wilkinson, A. F. Gardner, Sr., Attorneys for Petitioner, Columbus & Greenville Railway Company, and A. T. Stovall and A. F. Gardner.

Notice of the foregoing petition for appeal acknowledged and service waived, this the 23rd day of May, 1930.

Franklin, Easterling & Rosenthal, Attorneys for Appellee.

[File endorsement omitted.]

[fol. 85] In Supreme Court of Mississippi

[Title omitted]

Order Allowing Appeal and Approving Bond—Filed May 23, 1930

The above entitled matter, coming on for hearing, upon the petition of The Columbus & Greenville Railway Company, A. T. Stovall and A. F. Gardner, petitioners, for an

appeal from the final judgment of the Supreme Court of the State of Mississippi in the above entitled cause and upon examination of the said petition and the record in said matter and desiring to give the petitioners opportunity to present in the Supreme Court of the United States the questions presented by the record in the said matter, therefore it is ordered that an appeal with supersedeas from the judgment of the Supreme Court of the State of Mississippi be and is hereby allowed petitioners, as allowed by law, and that the appeal bond presented by the said petitioners, for fifteen thousand dollars ($15,000.00), be and the same is hereby approved.

This the 23rd day of May, 1930.

Sydney Smith, Chief Justice of the Supreme Court of the State of Mississippi.

O. K. Franklin, Esterling & Rosenthal, Attorneys for Appellee.

[File endorsement omitted.]

[fols. 86-90] Bond on appeal for $15,000, approved and filed May 23, 1930, omitted in printing.

[fol. 91] Citation, in usual form, showing service on Franklin, Easterling & Rosenthal, filed May 23, 1930, omitted in printing.

[fol. 92] In Supreme Court of Mississippi

[Title omitted]

Assignment of Error—Filed May 23, 1930

Plaintiffs in error, Columbus & Greenville Railway (Railroad) Company, a corporation chartered and organized under the laws of the State of Mississippi, and A. T. Stovall and A. F. Gardner, Sr., sureties upon its appeal bond to the State of Mississippi, would show unto the court in this assignment of error that there was manifest error prejudicial

to them apparent of record in the proceedings, decision and final judgment in the Supreme Court of the State of Mississippi in the above-entitled cause in this, to-wit:

(1) The Supreme Court of the State of Mississippi committed error in affirming the judgment of the Circuit Court of Montgomery County, Mississippi, appealed from, and in rendering final judgment against plaintiffs in error upon the 21st day of April, 1930, in the above entitled cause.

(2) The Supreme Court of the State of Mississippi committed error in affirming against the plaintiffs in error, Columbus & Greenville Railway (Railroad) Company, and A. T. Stovall and A. F. Gardner, Sr., its sureties, the judgment rendered against the Columbus & Greenville Railway (Railroad) Company in the Circuit Court of Montgomery County, October Term, 1929.

(3) The Supreme Court of the State of Mississippi committed error in failing and refusing to render a judgment reversing the judgment rendered against the Columbus & Greenville Railway (Railroad) Company in the Circuit Court of Montgomery County, Mississippi, appealed from, and in failing and refusing to render a judgment in the Supreme Court of the State of Mississippi in favor of the said Columbus & Greenville Railway (Railroad) Company and dismissing said suit.

(4) The Supreme Court of the State of Mississippi committed error in holding that Chapter 282 of the Mississippi [fol. 93] Laws of 1914 was valid over and against the objections of the Columbus & Greenville Railway (Railroad) Company that said Chapter 282, Mississippi Laws of 1914, as applied and enforced in this case, violated the Fourteenth Amendment to the Constitution of the United States, in that the same deprived the said Columbus & Greenville Railway (Railroad) Company of its property without due process of law and denied to it the equal protection of the law.

(5) The Supreme Court of the State of Mississippi committed error in holding that Chapter 259, Mississippi Laws of 1926, violated the Fourteenth Amendment to the Constitution of the United States, and that the classification

of railroads for purposes of levee taxation was arbitrary and unreasonable.

(6) The Supreme Court of the State of Mississippi committed error in holding that Chapter 259, Mississippi Laws of 1926, was not a valid and enforcible statute as applied to the Fourteenth Amendment of the Constitution of the United States and Paragraph 1 thereof, and that the same did not constitute a complete defense on the part of the said plaintiff in error to said action.

(7) The Supreme Court of the State of Mississippi committed error in excluding the testimony of the witness J. H. Rigby offered in the Circuit Court of Montgomery County, Mississippi, by plaintiff in error, wherein the plaintiff in error sought to prove the relative condition of the Columbus & Greenville Railway (Railroad) Company as compared with the Yazoo & Mississippi Valley Railroad Company; that is to say, the roadbed of the Yazoo & Mississippi Valley Railroad Company is six feet higher, four feet wider, has heavier rails, modern equipment and modern buildings; the Yazoo & Mississippi Valley Railroad receives vastly increased benefit from the construction of the levee than the Columbus & Greenville Railway (Railroad) Company, by reason of the mileage, buildings, equipment, volume of business, &c.; that the Columbus & Greenville Railway (Railroad) Company would only be protected by levee north of Greenville; that the current does the damage; the Yazoo & Mississippi Valley Railroad Company's engines handle four times as many cars as the Columbus & Greenville Railway (Railroad) Company; the physical condition of the Yazoo & Mississippi Valley Railroad Company's equipment is much higher; that all the equipment of the Columbus & Greenville Rail- [fol. 94] way (Railroad) is old and secondhand, facilities exceedingly limited, old and out of date; bridges on the Columbus & Greenville Railway (Railroad) light, not in good condition, not possible to use heavy engines on trains.

(8) The Supreme Court of the State of Mississippi committed error in affirming the action of the Circuit Court of Montgomery County, Mississippi, in excluding the evidence of C. P. Hawkins, showing the very great dissimil-

arity in the construction and operation of the Yazoo & Mississippi Valley Railroad as compared with the Columbus & Greenville Railway (Railroad), as well as the very great difference in the property and equipment of said two railroad companies.

(9) The Supreme Court of the State of Mississippi committed error in affirming the action of the Circuit Court of Montgomery County, Mississippi, in excluding the assessment for ad valorem taxes made by the Mississippi State Tax Commission against the Columbus & Greenville Railway (Railroad) Company for 1926, 1927 and 1928.

(10) The Supreme Court of the State of Mississippi committed error in affirming the action of the Circuit Court of Montgomery County, Mississippi, in excluding certified copy of classification of railroads for the purpose of levying privilege taxes made by the Mississippi State Railroad Commission for the years 1926 and 1927.

(11) The Supreme Court of the State of Mississippi committed error in holding that the appellee, W. J. Miller, State Tax-Collector, for the use of the Mississippi Levee District, had the right to assert that Chapter 259, Mississippi Laws of 1926, violated the Fourteenth Amendment to the Consitution of the United States.

(12) For other reasons apparent.

W. H. Watkins, A. F. Gardner, Sr., Attorneys for Plaintiffs in Error.

[fol. 94½] [File endorsement omitted.]

[fols. 95-125] In Supreme Court of Mississippi

[Title omitted]

Præcipe for Transcript of the Record—Filed May 23, 1930

The Clerk of the Supreme Court of the State of Mississippi in preparing and transmitting the record in the above-entitled cause to the Supreme Court of the United States, will include in the record the following:

(1) Declaration.
(2) Defendant's pleas and notice.
(3) Complete record of the testimony with all exhibits thereto.
(4) Final Judgment Circuit Court.
(5) Assignment of error in the Supreme Court of Mississippi.
(6) Suppmenental assignment of error.
(7) Judgment permitting supplemental assignment of error.
(8) Judgment of affirmance.
(9) Opinion of the Supreme Court of the State of Mississippi.

W. H. Watkins, A. J. Gardner, Sr., Attorneys for Appellants.

Service of the foregoing præcipe acknowledged.
This 23rd day of May, 1930.

Franklin, Easterling & Rosenthal, Attorneys for Appellee.

[fol. 126] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 127] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS RELIED UPON BY THE APPELLANTS AND STIPULATION OF PORTIONS OF THE RECORD TO BE PRINTED—Filed June 10, 1930

The Columbus & Greenville Railway Company, A. T. Stovall and A. F. Gardner, Sr., appellants in the above-entitled cause, in order to secure a reversal of the judgment appealed from, will rely upon the following points:

(1) Chapter 259, Mississippi Laws of 1926, provides a proper classification of railroads for taxation, and does not violate the Fourteenth Amendment to the Constitution of the United States, but is a valid enactment, and under the

terms thereof, appellants are entitled to be relieved of further liability.

(2) Chapter 259, Mississippi Laws of 1926, provides a proper and reasonable basis of classification of railroads for taxation in the Levee District, and does not violate the Fourteenth Amendment to the Constitution of the United States.

(3) The Supreme Court of the State of Mississippi held that Chapter 259, Mississippi Laws of 1926, violated the Fourteenth Amendment to the Constitution of the United States, thereby denying to the petitioners the immunity from liability for further payment of levee taxes which it asserted under said act, whereby the appellants were deprived of their property without due process of law and denied the equal protection of the law.

(4) In denying to the petitioners their claim of immunity from further liability for taxes under Chapter 259, Mississippi Laws of 1926, and in enforcing against them Chapter 282, Mississippi Laws of 1914, petitioners were deprived of their property without due process of law and denied the equal protection of the law.

(5) Under the Fourteenth Amendment to the Constitution of the United States, by virtue of the provisions of Chapter 259, Mississippi Laws of 1926, petitioners were [fol. 128] immune from further liability for taxes to the Levee District, for which judgment was rendered against them by the Supreme Court of the State of Mississippi.

(6) Chapter 282, Mississippi Laws of 1914, as construed and applied against appellants in this case, violates the Fourteenth Amendment to the Constitution of the United States, in that the same deprives the appellants of their property without due process of law and denies to them the equal protection of the law.

(7) The proof offered by the appellants established a vast difference in the location, situation, physical properties, earning power and proportionate exposure to damage from floods of the Mississippi River and benefits to accrue from the construction and maintenance of levees as com-

pared with the Yazoo & Mississippi Valley Railroad Company, the only other standard gauge railroad in the District.

(8) There were but two railroad companies in the District, the Columbus & Greenville Railway Company and the Yazoo & Mississippi Valley Railroad Company. The many facts of dissimilarity justified the classification made by the Legislature of the State of Mississippi, Chapter 259, Mississippi Laws of 1926.

(9) The Legislature of the State of Mississippi, in the absence of proof to the contrary, is presumed to have ascertained and found sufficient facts to justify the classification made in Chapter 259, Mississippi Laws of 1926.

(10) The classification of a railroad company according to a mileage basis is one of the most consistent methods therefor.

(11) Appellee is not entitled to avail himself of the Fourteenth Amendment to the Constitution of the United States. He has no personal interest in the controversy, and the Mississippi Levee District is not a person within the meaning of the Fourteenth Amendment.

(12) Other points to be presented at the hearing.

(13) Designation of portions of record to be printed.

The Clerk of this Court will print the entire record in the above-entitled cause transmitted from the Supreme Court of the State of Mississippi.

[fol. 129] Wm. H. Wilkins, Attorneys for Appellants.

Service acknowledged by copy.
This 7th day of June, 1930.
L. T. Easterling, Franklin, Easterling & Rosenthal,
Attorneys for Appellee.

[fol. 130] [File endorsement omitted.]

[fol. 131] IN SUPREME COURT OF THE UNITED STATES

AGREEMENT OF COUNSEL TO DISPENSE WITH PRINTING CERTAIN PORTIONS OF THE RECORD

In order to prevent the printing of certified copies of the assessment rolls of the Mississippi State Tax Commission forming part of the record in this case, it is agreed that for the years 1926, 1927 and 1928, the Mississippi State Tax Commission assessed for ad valorem taxes the railroad of the Columbus & Greenville Railway Company in the Levee District at one thousand dollars ($1000.00) per mile; that the railroad of the Yazoo & Mississippi Valley Railroad Company was assessed for ad valorem taxes in the Mississippi Levee District at thirty-two thousand dollars, ($32,000.00) per mile; that at the trial of this cause in the Circuit Court of Montgomery County, Mississippi, the plaintiff objected to the introduction of said assessment rolls as incompetent, immaterial and irrelevant; that such testimony was excluded by the court and the action of the Circuit Court of Montgomery County, Mississippi, was affirmed by the Supreme Court of the State of Mississippi in the judgment appealed from, and that such assessment roll be not printed with the record.

Wm. H. Wilkins, Attorneys for Petitioner. Franklin, Easterling & Rosenthal, by Simon Rosenthal, Attorneys for Respondent.

Endorsed on cover: File No. 35,117. Mississippi Supreme Court. Term No. 195. Columbus & Greenville Railway Company et al., Appellants, vs. W. J. Miller, State Tax Collector, for the use of the Mississippi Levee District. Filed June 10, 1930. File No. 35,117.

Supreme Court of the United States

Order Allowing Certiorari—Filed October 20, 1930

The petition herein for a writ of certiorari to the Supreme Court of the State of Mississippi is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
JUL 12 1930
CHARLES ELMORE CROPLEY
CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

NO. 195

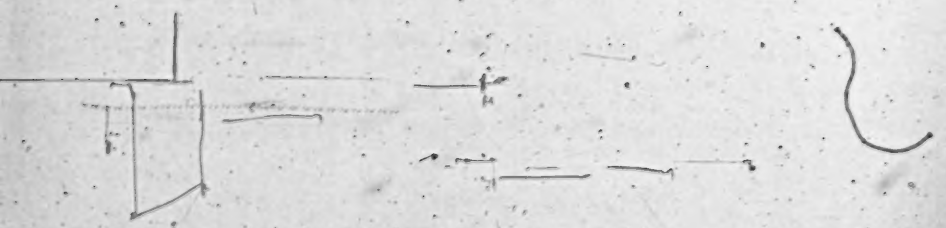
COLUMBUS & GREENVILLE RAILWAY CO., ET AL., APPELLANTS,

VS.

W. J. MILLER, STATE TAX COLLECTOR, Etc., APPELLEE.

STATEMENT OF JURISDICTION

Wm. H. WATKINS,
A. F. GARDNER, Sr.,
R. C. STOVALL,
A. F. GARDNER, Jr.,
H. T. ODOM,
Attorneys for Appellants.



In The Supreme Court of The United States

OCTOBER TERM, 1930

NO. 195

COLUMBUS & GREENVILLE RAILWAY CO., ET AL., APPELLANTS, VS.

W. J. MILLER, STATE TAX COLLECTOR, Etc., APPELLEE.

STATEMENT OF JURISDICTION

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Appellants submit, in compliance with Rule 12, Revised Rules of the Supreme Court of the United States, adopted June 5, 1928, the following statement of the basis of this Court's jurisdiction to review, on appeal, the judgment of the Supreme Court of the State of Mississippi.

A.

STATUTORY PROVISION SUSTAINING JURISDICTION.

The jurisdiction of this Court is invoked under Section 237 (a) Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 937, being Section 344, Judicial Code, U. S. Code Ann., Title 28.*

*All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the Supreme Court of the State and on file with the Clerk of the Court. The record has not yet been printed.

B.

DATE OF JUDGMENT AND DATE OF APPLICATION FOR APPEAL.

The decree of the Supreme Court of the State of Mississippi affirming the judgment of the Circuit Court of Montgomery County, Mississippi, appealed from, was entered April 21st, 1930. R. 76. 127 So. 784,

The petition for appeal was presented on the 23rd day of May, 1930, R. 79; allowed on the 23rd day of May, 1930, R. 85.

C.

NATURE OF THE CASE AND RULING BELOW.

The Mississippi Levee District was organized Chapter 1, Mississippi Laws of 1865. The territory comprised therein included the counties of Washington, Bolivar and Issaquena. Due to the creation of new counties, it now also comprises parts of Sharkey, Warren and Humphreys Counties.

Section 237 of the Mississippi State Constitution is in the following language:

> "Section 237. The legislature shall have full power to provide such system of taxation for said

levee districts as it shall, from time to time, deem wise and proper."

The Columbus & Greenville Railway Company is a Mississippi corporation, hereinafter referred to as the company, operating a line of railroad from Columbus, Mississippi, in a westerly direction to Greenville, Washington County, Mississippi, a distance of 168 miles. It runs across the levee district at right angles from the Mississippi River a distance of 18.41 miles.

Section 1, Chapter 282, Mississippi Laws of 1914, is in the following language:

"Section 1. Be it enacted by the Legislature of the State of Mississippi, that Chapter one hundred and twenty-five of the Acts of 1908 be and the same is hereby amended so as to read as follows:

"That Chapter 7 of the Acts of 1886 be and the same is hereby amended so as to read as follows:

"That for the purpose of contributing to the expense of building, maintaining and repairing levees in the Mississippi levee district and of paying the debts and liabilities incurred therefor, by the Board of Mississippi Levee Commissioners, the following tax is hereby levied and assessed upon all railroads and parts of railroads lying and situated in the said levee district, to-wit: Upon each and every mile of the main or trunk line of all broad or standard guage railroads, not including side tracks or switches, the sum of $350.00 per annum; upon each and every mile of

narrow gauge railroad or railroads of less width than standard guage, not including side tracks or switches, the sum of $87.50 per annum; and upon each and every mile of broad or standard guage railroads, not used and operated as a main trunk line, but constituting and used as a feeder to a branch or a main or trunk line with some other system, the sum of $210.00 per annum; provided that no railroad or branch railroad shall be subject to taxation under this act while the same is in process of construction, but if any part thereof shall be used for profit, that part so used shall be taxed, although the whole of said railroad or branch may not be finished."

Section 1, Chapter 259, Mississippi Laws of 1926, is in the following language:

"That for the purpose of contributing to the expense of building, maintaining and repairing levees in the Mississippi levee district, and of paying the debts and liabilities incurred thereof, by the Board of Mississippi Levee Commissioners, the following tax is hereby levied and assessed upon all railroads and parts of railroads lying and situated in the said levee district, to-wit: Upon each and every mile of the main or trunk line of all broad or standard guage railroads, not including side-tracks or switches, the sum of $350.00 per annum; upon each and every mile of narrow guage railroad or railroads of less width than standard guage, not including side tracks or switches, the sum of $87.50 per annum; and upon each and every mile of broad or standard guage railroads, not used and operated as a main or trunk line, but constituting and used as a feeder or a branch of a main or trunk line, or to connect such main or trunk line

with some other system, the sum of $210.00 per annum; provided, that no railroad or branch railroad shall be subject to taxation, under this act while the same is in process of construction, but if any part hereof shall be used for profit, that part so used shall be taxed, although the whole of said railroad or branch may not be finished; provided further that the tax per mile per annum on the main line of any railroad company which does not own in excess of twenty-five miles of railroad in the Mississippi levee district shall be $50.00 per annum."

That for the years 1926 and 1927, since the main line of the Columbus & Greenville Railway Company did not exceed twenty-five miles in the levee district, it paid to the tax-collector thereof the sum of $50.00 per mile per annum, in accordance with the provisions of the Act of 1926. R. 60.

The appellee, W. J. Miller, State Tax-Collector, for the use of the Mississippi Levee District, is an officer whose duty it is under the statutes of the State of Mississippi to enforce payment of past due taxes and other obligations of the State of Mississippi, or any subdivision thereof, including the Mississippi Levee District.

Upon the 31st day of July, 1928, the state tax-collector filed suit in the Circuit Court of Montgomery County, Mississippi, for the recovery of privilege taxes payable to the Mississippi Levee District under Chapter 282, Mississippi Laws of 1914, aforesaid, at the rate of $350.00 per mile. The plaintiff alleged that Chapter 259, Mississippi Laws of 1926, was invalid, in that the same was adopted by the Leg-

islature of the State of Mississippi in disregard of Section 234 of the Constitution of the State of Mississippi. R. 3.

To which declaration, the company demurred on the ground that the plaintiff's declaration revealed that it had discharged all liability for privilege taxes imposed upon it by Chapter 259, Mississippi Laws of 1926, which repealed Section 1, Chapter 282, Mississippi Laws of 1914.

The trial court sustained the demurrer and dismissed the action.

On appeal by the state tax-collector to the Supreme Court of the State of Mississippi, the court held that Chapter 259, Mississippi Laws of 1926, violated the Fourteenth Amendment to the Constitution of the United States, and was void, and that the company owed to the levee district the mileage tax provided in Chapter 282, Mississippi Laws of 1914. The case is reported, *Miller, State Tax Collector, vs. Columbus & Greenville Railway Co.*, 122 So. 366, 154 Miss. 317. The court used the following language at page 323:

> "Chapter 259, Laws of 1926, divides railroads into two classes: First, railroads not having more than twenty-five miles of railroad in the levee district; and, second, all other railroads therein. The ground of the appellant's contention is that this classification has no reasonable relation to the purpose for which the statute was enacted, but is arbitrary and unreasonable, and therefore in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution. This is so manifestly correct that the

citation of authorities therefor would be supererogatory. It will not be necessary for us to decide whether this results simply in the proviso of Chapter 259, Laws of 1926, being void, or in the whole statute being void, for in either event the tax which the appellee will have to pay will be the same, that is, three hundred and fifty dollars per annum on each mile of its railroad in the levee district."

The case was remanded to the Circuit Court of Montgomery County, Mississippi, and, among other pleas, the company pleaded that Chapter 259, Mississippi Laws of 1926, was consistent with the Fourteenth Amendment to the Constitution of the United States and a valid law thereunder. R. 8.

Said plea contained the following additional language:

"The said defendant having discharged its liabilities to said Mississippi Levee District under said Act, now sets up, alleges and avers that it has acquired, and now has, under the Fourteenth Amendment to the Constitution of the United States, the right, privilege and immunity from further liability for taxes to the said Mississippi Levee District."

The Company's plea further alleged that to hold Chapter 259, Laws of 1926, invalid and enforce Chapter 282, Mississippi Laws of 1914, under the facts and circumstances shown by the testimony, against the company, would render such last mentioned act violative of the Fourteenth Amendment to the Constitution of the United States, in that the same would deprive the company of its property without due process of law, and deny to it the equal protection of the law. R. 14.

The case went to trial on the facts, and it appeared that there were but two railroads at the time of the passage of the Act of 1926 in the levee district operating standard gauge main lines:

(a) The Yazoo & Mississippi Valley Railroad Company, an interstate carrier, running from New Orleans in the State of Louisiana to Memphis in the State of Tennessee, forming part of the great Illinois Central System. That the said Yazoo & Mississippi Valley Railroad Company operated its main line north and south through the levee district, parallel with the Mississippi River, a distance of 117.15 miles; that, owing to the exposure to the flood waters of the Mississippi River, it required and had a road bed six feet higher and four feet wider than that of the Columbus & Greenville Railway Company; that it had and required heavier rails, depots, shops and buildings, all of which were modern in every respect.

(b) The Columbus & Greenville Railway Company, an intrastate railroad, running through the district across Washington County, Mississippi, to the Mississippi River, at right angles from the Mississippi River, a distance of 18.41 miles, the equipment of which was old, dilapidated, worn out, its locomotives not having exceeding one-fourth of the capacity of the locomotives of the Yazoo & Mississippi Valley Railroad Company.

The company also introduced other evidence, tending to show the substantial difference between the two railroads, which were the only two affected; and, also, introduced other evidence tending to show substantial differences which would exist in respect to the operation of any rail-

road at right angles from the river and one running through the entire district parallel with the river. R. 24; R. 46-50.

Under Chapter 118, Mississippi Laws of 1926, being Section 7740 of Hemingway's Mississippi 1927 Code, the Railroad Commission of the State of Mississippi was authorized to classify railroads for payment of state privilege taxes. A copy of the Act is made appendix hereto.

The company offered to prove that under this act, the Railroad Commission of the State of Mississippi classified the Yazoo & Mississippi Valley Railroad Company as a first class railroad and classified the Columbus & Greenville Railway as a third class railroad.

Objection was made by the appellee to the introduction of the testimony, and the same was sustained. R. 51.

The company also offered to prove that the tax commissioners of the State of Mississippi, in assessing railroad property in the State of Mississippi for ad valorem taxes, fixed the valuation of the company's property at one thousand dollars per mile; while that of the Yazoo & Mississippi Valley Railroad Company was assessed at thirty-two thousand dollars per mile. The admission of this testimony was likewise objected to by the appellee and excluded. Judgment was entered against the company for taxes in accordance with the provisions of the act of 1914 for the full amount sued for; that is to say, a tax of $350.00 per mile, crediting the company with $50.00 per mile paid by it. R. 18.

The Columbus & Greenville Railway Company prose-

cuted its appeal to the Supreme Court of the State of Mississippi, and by appropriate assignment of error, reasserted the validity of the Act of 1926 under the Fourteenth Amendment to the Constitution of the United States, and that said railroad company, appellant, was deprived of its property without due process of law and denied the equal protection of the law by declaring said Act of 1926 invalid and enforcing against it Chapter 282 of the Mississippi Laws of 1914. R. 66.

The judgment of the Circuit Court of Montgomery County, Mississippi, complained of was affirmed. R. 76.

The court delivered the following opinion, reported 127 So. 784:

> "This case is ruled by the opinion rendered on the former appeal herein, (154 Miss. 317, 122 So. 366), to which we adhere, and the evidence excluded, if competent, as to which we express no opinion, could not have changed the result. Affirmed."

Appellants A. T. Stovall and A. F. Gardner, Sr., became sureties on the appeal bond of the railway company to the Supreme Court of the State of Mississippi from the judgment rendered in the Circuit Court of Montgomery County, Mississippi.

There is pending in this case a petition for writ of certiorari, reference to which is made in aid of this statement. It was, in the court below, and is the contention of the appellants here that Chapter 282, Mississippi Laws of 1914, as enforced and construed by the Supreme Court of the State

of Mississippi in this case, violated the Fourteenth Amendment to the Constitution of the United States, in that the appellants were deprived of their property without due process of law and denied the equal protection of the law, for that:

(1) The tax imposed was for the construction and maintenance of a local improvement, to-wit, the levees along the banks of the Mississippi River, within the Mississippi Levee District, and that the benefits received by the Columbus & Greenville Railway Company, under the facts and circumstances shown and offered to be shown in this case are so utterly disproportionate to the benefits had and received by the Yazoo & Mississippi Valley Railroad Company that there is no reasonable presumption that substantial justice will be done; upon the other hand, the application of a tax of $350.00 per mile to the Columbus & Greenville Railway Company, under the facts and circumstances in this case, is arbitrary, discriminatory and unjust, having no relation to the comparative benefits received by it.

(2) The tax levied in this case for the purpose of creating and maintaining local improvement provides no judicial method by which the Columbus & Greenville Railway Company might secure a determination of the proportionate part of the tax to be borne by it. The Yazoo & Mississippi Valley Railroad Company is an interstate carrier, operating parallel with the Mississippi River, 117 miles of the most modern and superior construction, and having and maintaining, largely exposed to the flood waters of the Mississippi River for its entire length through the district railroad properties of vast and enormous values. Upon the other hand,

the Columbus & Greenville Railway Company is of inferior, antiquated construction, operating at right angles to the Mississippi River, so that the protection which it would receive from the levees on the Mississippi River, and the values of its railroad property protected thereby, were so out of proportion to the only other standard gauge main line railroad operating in the levee district that the placing of the same mileage tax upon the Columbus & Greenville Railway Company as was assessed against the Yazoo & Mississippi Valley Railroad Company was discriminatory and arbitrary, and that some statutory judicial method should have been provided so that it might secure a determination of its proportionate part of the tax.

We call the Court's attention to the fact that the State Board of Tax Assessors, in valuing property for ad valorem taxes, assessed that of the appellant railroad company at only 1/32 part of the Yazoo & Mississippi Valley Railroad Company. See agreement of counsel hereto attached.

We further call attention of the Court to the fact that the Railroad Commission of the State of Mississippi, having authority under the law to classify railroads for privilege tax under the law, fully appreciated the inferior construction and value of the appellant's railroad, and placed it in the third class of railroads, while the Yazoo & Mississippi Valley Railroad was placed in the first class. See Chapter 118, Mississippi Laws of 1926, Appendix.

The Supreme Court of the State of Mississippi held that the determination of the Railroad Commission on the subject was binding on it. See *N. M. & C. R. R. Co., vs. State* 70 So. 355, 110 Miss. 290.

Yet, under the statute before the Court, providing funds for the construction and maintenance of a local improvement, the court strikes down the Act of 1926, and arbitrarily and of its own motion, places the Columbus & Greenville Railway Company in the same class with the Yazoo & Mississippi Valley Railroad Company. It is the contention of the appellant that in determining the constitutional question, facts offered to be proved will be treated as having been proved. *Fairmont Creamery Co., vs. Minnesota*, 274 U. S. 1, 71 L. Ed. 893.

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Respectfully submitted,
Wm. H. WATKINS,
A. F. GARDNER, Sr.,
R. C. STOVALL,
A. F. GARDNER, Jr.,
H. T. ODOM,
Attorneys for Appellants.

APPENDIX.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930

NO. 195.

COLUMBUS & GREENVILLE RAILWAY CO. ET AL., PETITIONERS.

VS.

W. J. MILLER, STATE TAX COLLECTOR.

AGREEMENT OF COUNSEL TO DISPENSE WITH PRINTING CERTAIN PORTIONS OF THE RECORD

In order to prevent the printing of certified copies of the assessment rolls of the Mississippi State Tax Commission forming part of the record in this case, it is agreed that for the years 1926, 1927 and 1928, the Mississippi State Tax Commission assessed for ad valorem taxes the railroad of the Columbus & Greenville Railway Company in the Levee District at one thousand dollars ($1,000.00) per mile; that the railroad of the Yazoo & Mississippi Valley Railroad Company was assessed for ad valorem taxes in the Mississippi Levee District at thirty-two thousand dollars, ($32,000.00) per mile; that at the trial of this cause in the Circuit Court of Montgomery County, Mississippi, the plaintiff objected to the introduction of said assessment rolls as incompetent, immaterial and irrelevant; that such testimony was excluded by the court and the action of the Circuit Court of Montgomery County, Mississippi, was affirm-

ed by the Supreme Court of the State of Mississippi in the judgment appealed from, and that such assessment roll be not printed with the record.

W. H. WATKINS,
Attorney for Petitioner
FRANKLIN, EASTERLING & ROSENTHAL,
By SIMON ROSENTHAL,
Attorneys for Respondent.

APPENDIX.

Chapter 118, Miss. Laws, 1926, Sec. 7740, Hemingway's 1927 Code.

7740. Railroads.—186. Section 3856 of Chapter 114 of the Code of 1906, levying privilege taxes on railroads, be and the same is hereby amended so that for the purpose of levying a privilege tax on railroads, such railroads are divided into four classes: 1st, 2nd, 3rd and narrow gauge, and privilege taxes levied on them as follows:

On each railroad of the first class, per mile	$45.00
On each railroad of the second class, per mile	25.00
On each railroad of the third class, per mile	10.00
On each narrow guage railroad, per mile	2.50

The railroad commission shall, annually, on or before the first Monday in August, classify the several railroads according to their charter and the gross earnings of each, and the privilege taxes thereon shall be paid on or before the first day of December, and the findings of the said railroad commission shall be certified to the auditor of public accounts and the chancery clerk of the county through which

each road or roads run; and any person or persons, natural or artificial, who shall exercise any of the privileges taxed herein, without first paying the tax and procuring the tax or license, as required by law, shall be subject to the pains and penalties imposed by Section 3894 of the Code of 1906, and to such other pains and penalties as may be otherwise provided by law. (Laws 1926, Chap. 118. In effect April 30, 1926).

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

NO. 195.

COLUMBUS & GREENVILLE RAILWAY COMPANY

VS.

W. J. MILLER, STATE TAX COLLECTOR

AGREEMENT OF COUNSEL.

It is agreed by and between attorneys representing the appellant and appellee in the above-entitled cause that the Columbus & Greenville Railway Company may have one week's additional time within which to file its statement of jurisdiction.

Signed, this the 8th day of July, 1930.

Wm. H. Watkins,
Attorney for Appellant.
Franklin, Easterling & Rosenthal,
Attorneys for Appellee.

FILE COPY

JUN 10 1930

CHARLES ELMORE CROPL
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

COLUMBUS & GREENVILLE RAILWAY COMPANY ET AL., Petitioners;

VS. NO. 195

W. J. MILLER, STATE TAX-COLLECTOR, ETC., Respondent.

PETITION FOR WRIT OF CERTIORARI WITH BRIEF THEREON.

WM. H. WATKINS,
A. F. GADRNER, SR.,
R. C. STOVALL,
A. F. GARDNER, JR.,
H. T. ODOM,
Attorneys for Petitioners.



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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

NO.———.

COLUMBUS & GREENVILLE RAILWAY CO., ET AL., PETITIONERS,

VS.

W. J. MILLER, STATE TAX-COLLECTOR, FOR THE USE OF MISSISSIPPI LEVEE DISTRICT

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of the Columbus & Greenville Railway Company, A. T. Stovall and A. F. Gardner, Sr., Petitioners, respectfully shows unto this Court:

A.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

The Mississippi Levee District was organized Chapter 1, Mississippi Laws of 1865. The territory comprised therein included the counties of Washington, Bolivar and Issaquena. Due to the creation of new counties, it now also comprises parts of Sharkey, Warren and Humphreys counties.

Section 237 of the Mississippi State Constitution is in the following language:

"Section 237. The legislature shall have full power to provide such system of taxation for said levee districts as it shall, from time to time, deem wise and proper."

The Columbus & Greenville Railway Company is a Mississippi corporation, hereinafter referred to as the company, operating a line of railroad from Columbus, Mississippi, in a westerly direction to Greenville, Washington County, Mississippi, a distance of 69 miles. It runs across the levee district at right angles from the Mississippi River, a distance of 18.41 miles.

Section 1, Chapter 282, Mississippi Laws of 1914, is in the following language:

"Section 1. Be it enacted by the Legislature of the State of Mississippi, That Chapter one hundred and twenty-five of the Acts of 1908 be and the same is hereby amended so as to read as follows:

"That Chapter 7 of the Acts of 1886 be and the same is hereby amended so as to read as follows:

"That for the purpose of contributing to the expense of building, maintaining and repairing levees in the Mississippi levee district, and of paying the debts and liabilities incurred therefor, by the Board of Mississippi Levee Commissioners, the following tax is hereby levied and assessed upon all railroads and parts of railroads lying and situated in the said levee district, to-wit: Upon each and every mile of the main or trunk line of all broad or standard guage railroads, not including side tracks or switches, the sum of

$350.00 per annum; upon each and every mile of narrow guage railroad or railroads of less width than standard guage, not including side tracks or switches, the sum of $87.50 per annum; and upon each and every mile of broad or standard guage railroads, not used and operated as a main or trunk line, but constituting and used as a feeder to a branch or a main or trunk line, or to connect such main or trunk line with some other system, the sum of $210.00 per annum; provided that no railroad or branch railroad shall be subject to taxation under this act while the same is in process of construction, but if any part thereof shall be used for profit, that part so used shall be taxed, although the whole of said railroad or branch may not be finished."

Section 1, Chapter 259, Mississippi Laws of 1926, is in the following language:

"That for the purpose of contributing to the expense of building, maintaining and repairing levees in the Mississippi levee district, and of paying the debts and liabilities incurred thereof, by the Board of Mississippi Levee Commissioners, the following tax is hereby levied and assessed upon all railroads and parts of railroads lying and situated in the said levee district, to-wit: Upon each and every mile of the main or trunk line of all broad or standard guage railroads, not including side tracks or switches, the sum of $350.00 per annum; upon each and every mile of narrow gauge railroad or railroads of less width than standard gauge, not including side tracks or switches, the sum of $87.50 per annum; and upon each and every mile of broad or standard guage railroads, not used and operated as a main or trunk line, but constituting and used as a feeder to

or a branch of a main or trunk line, or to connect such main or trunk line with some other system, the sum of $210.00 per annum; provided, that no railroad or branch railroad shall be subject to taxation, under this act while the same is in process of construction, but if any part hereof shall be used for profit, that part so used shall be taxed, although the whole of said railroad or branch may not be finished; provided further that the tax per mile per annum on the main line of any railroad company which does not own in excess of twenty-five miles of railroad in the Mississippi levee district shall be $50.00 per annum."

That for the years 1926 and 1927, since the main line of the Columbus & Greenville Railway Company did not exceed twenty-five miles in the levee district, it paid to the tax collector thereof the sum of $50.00 per mile per annum, in accordance with the provisions of the Act of 1926. R. 60.

The respondent, W. J. Miller, State-Collector, for the use of the Mississippi Levee District, is an officer whose duty it is under the statutes of the State of Mississippi to enforce payment of past due taxes and other obligations of the State of Mississippi, or any subdivision thereof, including the Mississippi Levee District.

Upon the 31st day of July, 1928, the state tax-collector filed suit in the circuit Court of Montgomery County, Mississippi, for the recovery of privilege taxes payable to the Mississippi Levee District under Chapter 282, Mississippi Laws of 1914, aforesaid, at the rate of $350.00 per mile. The plaintiff alleged that Chapter 259, Mississippi Laws of 1926, was invalid, in that the same was adopted by the Leg-

islature of the State of Mississippi in disregard of Section 234 of the Constitution of the State of Mississippi. R. 3.

To which declaration, the company demurred on the ground that the plaintiff's declaration revealed that it had discharged all liability for privilege taxes imposed upon it by Chapter 259, Mississippi Laws of 1926, which repealed Section 1, Chapter 282, Mississippi Laws of 1914.

The trial court sustained the demurrer and dismissed the action.

On appeal by the state tax-collector to the Supreme Court of the State of Mississippi, the court held that Chapter 259, Mississippi Laws of 1926, violated the Fourteenth Amendment to the Constitution of the United States, and was void; and that the company owed to the levee district the mileage tax provided in Chapter 282, Mississippi Laws of 1914. The case is reported, *Miller State Tax-Collector, v. Columbus & Greenville Railway Co.*, 122 So. 366, 154 Miss. 317. The Court used the following language at page 323:

"Chapter 259, Laws of 1926, divides railroads into two classes: First, railroads not having more than twenty-five miles of railroad in the levee district; and, second, all other railroads theerin. The ground of the appellant's contention is that this classification has no reasonable relation to the purpose for which the statute was enacted, but is arbitrary and unreasonable, and therefore in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution. This is so manifestly correct that the citation of authorities therefor would be su-

pererogatory. It will not be necessary for us to decide whether this results simply in the proviso of Chapter 259, Laws of 1926, being void, or in the whole statute being void, for in either event the tax which the appellee will have to pay will be the same, that is, three hundred and fifty dollars per annum on each mile of its railroad in the levee district."

The case was remanded to the Circuit Court of Montgomery County, Mississippi, and among other pleas, the company pleaded that Chapter 259, Mississippi Laws of 1926, was consistent with the Fourteenth Amendment to the Constitution of the United States and a valid law thereunder. R. 8.

Said plea contained the following additional language:

"The said defendant having discharged its liabilities to said Mississippi Levee District under said Act, now sets up, alleges and avers that it has acquired, and now has, under the Fourteenth Amendment to the Constitution of the United States, the right, privilege and immunity from further liability for taxes to the said Mississippi Levee District."

The company's plea further alleged that to hold Chapter 259 Laws of 1926, invalid and enforce Chapter 282, Mississippi Laws of 1914, under the facts and circumstances shown by the testimony, against the company, would render such last mentioned act violative of the Fourteenth Amendment to the Constitution of the United States, in that the same would deprive the company of due process of law, and deny to it the equal protection of the law. R. 14.

The case went to trial on the facts, and it appeared that there were but two railroads at the time of the passage of the Act of 1926 in the levee district operating standard gauge main lines:

(a) The Yazoo & Mississippi Valley Railroad Company, an interstate carrier, running from New Orleans in the State of Louisiana, to Memphis in the State of Tennessee, forming part of the great Illinois Central System. That the said Yazoo & Mississippi Valley Railroad Company operated its main line north and south through the levee district, parallel with the Mississippi River, a distance of 117.15 miles; that, owing to the exposure to the flood waters of the Mississippi River, it required and had a road bed six feet higher and four feet wider than that of the Columbus & Greenville Railway Company; that it had and required heavier rails, depots, shops and buildings,, all of which were modern in every respect.

(b) The Columbus & Greenville Railway Company, petitioner, an intrastate railroad, running through the district across Washington County, Mississippi, to the Mississippi River at right angles from the Mississippi River, a distance of 18.41 miles, the equipment of which was old, dilapidated, worn out, its locomotives not having exceeding one-fourth of the capacity of the locomotives of the Yazoo & Mississippi Valley Railroad Company.

The company also introduced other evidence, tending to show the substantial difference between the two railroads, which were the only two affected; and, also, introduced

other evidence tending to show substantial differences which would exist in respect to the operation of any railroad at right angles from the river and one running through the entire district parallel with the river. R. 24; R. 46-50.

Under Chapter 118, Mississippi Laws of 1926, being Section 7740 of Hemingway's Mississippi 1927 Code, the Railroad Commission of the State of Mississippi was authorized to classify railroads for payment of state privilege taxes. A copy of the act is made appendix hereto.

The company offered to prove that under this act, the Railroad Commission of the State of Mississippi classified the Yazoo & Mississippi Valley Railroad Company as a first class railroad and classified the Columbus & Greenville Railway as a third class railroad.

Objection was made to the appellee to the introduction of the testimony, and the same was sustained. R. 51.

The company also offered to prove that the tax commissioners of the State of Mississippi, in assessing railroad property in the State of Mississippi for ad valorem taxes, fixed the valuation of the company's property at one thousand dollars per mile; while that of the Yazoo & Mississippi Valley Railroad Company was assessed at thirty-two thousand dollars per mile. The admission of this testimony was likewise objected to by the appellee and excluded. Judgment was entered against the company for taxes in accordance wit hthe provisions of the act of 1914 for the full amount sued for; that is to say, a tax of $350.00 per mile, crediting the company with $50.00 per mile paid by it. R. 18.

The Coulmbus & Greenville Railway Company prosecuted its appeal to the Supreme Court of the State of Mississippi, and by appropriate assignment of error, reasserted the validity of the Act of 1926 under the Fourteenth Amendment to the Constitution of the United States, and that said railroad company, appellant, was deprived of its property without due process of law and denied the equal protection of the law by declaring said Act of 1926 invalid and enforcing against it Chapter 282 of the Mississippi Laws of 1914. R. 66.

The judgment of the Circuit Court of Montgomery County, Mississippi, complained of was affirmed. R. 76.

The court delivered the following opinion, reported 127 So. 784:

"This case is ruled by the opinion rendered on the former appeal herein, (154 Miss. 317, 122 So. 366), to which we adhere, and the evidence excluded, if competent, as to which we express no opinion, could not have changed the result. Affirmed."

Petitioners A. T. Stovall and A. F. Gardner, Sr., became sureties on the appeal bond of the railway company to the Supreme Court of the State of Mississippi from the judgment rendered in the Circuit Court of Montgomery County, Mississippi, and join in this petition by reason thereof.

B.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The petitioners would therefore respectfully show to this Honorable Court that the decision of the Supreme Court of the State of Mississippi should be reviewed by this Honorable Court on certiorari for the following reasons, to-wit:

1. Chapter 259, Mississippi Laws of 1926, does not violate the Fourteenth Amendment to the Constitution of the United States, but is consistent therewith and is a valid and legal enactment. That under such act, as applicable to the Fourteenth Amendment to the Constitution of the United States, the said railway company, petitioner, had discharged its full liability to the Mississippi Levee District, and was immune and free from further liability for privilege taxes sued for.

2. That the Supreme Court of the State of Mississippi invalidated the Act of 1926, reinstated the Act of 1914, and by so doing, deprived petitioners of their rights under the Fourteenth Amendment to the Constitution of the United States, in that their property was taken without due process of law and they were denied the equal protection of the law.

3. The classification of railroads under Chapter 259, Mississippi Laws of 1926, was consistent with the Fourteenth Amendment to the Constitution of the United Sttes, rested upon sound and reasonable differences, and was not shown to be in any manner arbitrary.

4. The Supreme Court of the State of Mississippi committed error in holding against the validity of Chapter 259, Mississippi Laws of 1926.

5. The Supreme Court of the State of Mississippi committed error in holding valid and enforcing against plaintiffs in error Chapter 282, Mississippi Laws of 1914.

6. The Supreme Court of Mississippi has decided Federal questions of substance not heretofore determined by this Court, and has decided them in a way not in accordance with the applicable decisions of this Court. The questions involved are novel, in that petitioners do not find in any reported case where this Court has been called upon to review the judgment of a state court where an act of the state legislature has been declared invalid as being in violation of the Fourteenth Amendment to the Constitution of the United States. The questions are important in that they involve questions of classification of railroads for state taxation, and the decision of the state court was against the validity of an act of the Mississippi State Legislature providing classification for taxation. Petitioners therefore show unto the Court that the present case is one in which it is proper for this Court to issue a writ of certiorari.

7. Petitioners believe that said judgment of the Supreme Court of the State of Mississippi is erroneous, and that this Honorable Court should require the cause to be certified to it for review and determination under the Acts of Congress in such case made and provided. Petitioners accompany the petition with one certified copy of the record in the Supreme Court of Mississippi and reference is made here to such record.

Wherefore, petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Mississippi, commanding that court to certify and send to this court for its review and determination on a day certain, to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket Columbus & Greenville Railway Company vs. W. J. Miller, State Tax-Collector, 28,555; and that said judgment of the Circuit Court of Montgomery County, Mississippi, affirmed by the Supreme Court of the State of Mississippi, may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioners will ever pray.

COLUMBUS & GREENVILLE RY. CO.,
A. T. STOVALL,
A. F. GARDNER, SR.,
By W. H. WATKINS,
A. F. GARDNER, JR.,
R. C. STOVALL,
Counsel for Petitioners.

In The Supreme Court of The United States

OCTOBER TERM, 1929.

COLUMBUS & GREENVILLE RAILWAY CO., ET AL., PETITIONERS,

VS.

W. J. MILLER FOR THE USE OF MISSISSIPPI LEVEE DISTRICT, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

Miller, State Tax-Collector, Etc., Vs. C. & G. Ry. Co., 122 So. 366, 154 Miss. 317; Columbus & Greenville Railway Co. Vs. W. J. Miller, State Tax-Collector, Etc., 127 So. 784.

II.

JURISDICTION.

1. Petitioners claim that this Court has jurisdiction to issue writ of certiorari to the Supreme Court of the State of Mississippi under Paragraph (b), Section 344, Title 28, U. S. C. A., as amended by the Act February 13, 1925; said paragraph being in the following language:

"(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision

could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States; or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held, or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

2. The date of the judgment to be reviewed is April 21, 1930.

3. In this case there was drawn in question the validity of Chapter 259, Mississippi Laws of 1926, on the ground of its being repugnant to the Fourteenth Amendment to the Constitution of the United States, and the decision of the state court was against the validity of the act.

In said case also, the petitioners set up and presented claim, right, privilege or immunity under the Constitution of the United States, in that they asserted and claimed that, as applied to the Fourteenth Amendment to the Constitution of the United States, Chapter 259, Mississippi Laws

of 1926, was valid and afforded them immunity from liability. The decision of the Supreme Court of the State of Mississippi was against the right, privilege and immunity set up and claimed. The petitioners claimed and asserted in the state court that if Chapter 259, Mississippi Laws of 1926, should be held invalid as violating the Fourteenth Amendment to the Constitution of the United States, and that Chapter 282, Mississippi Laws of 1914, should be enforced against them under the facts and circumstances shown, they would be deprived of their property without due process of law and denied the equal protection of the law.

The Petitioners cite as sustaining the Jurisdiction of this court the following cases:

4. (a) The petitioners contend that Chapter 259, Mississippi Laws of 1926, is, as applied to the Fourteenth Amendment to the Constitution of the United States, valid and assert immunity from further liability. The petitioners further assert that if said act should be held invalid and liability imposed on the railway company by reason of Chapter 282, Mississippi Laws of 1914, petitioners will be deprived of their property without due process of law and denied the equal protection of the law, which is reviewable by certiorari: *Grayson vs. Harris*, 267 U. S. 352, 69 L. Ed. 652; *Fullerton vs. Northern Pac. R. Co.*, 266 U. S. 435, 69 L. Ed. 367; *Bullock vs. State of Florida*, 254 U. S. 513, 65 L. Ed. 380; *Ward vs. Love County*, 253 U. S. 17, 64 L. Ed. 751; *Ireland vs. Woods*, 246 U. S. 323, 62 L. Ed. 745; *Philadelphia & Reading Coal Co., vs. John Gilbert*, 245 U. S. 162, 62 L. Ed. 221.

(b) In this case there was brought in question, as being in violation of the Fourteenth Amendment to the Constitution of the United States, Chapter 259, Mississippi Laws of 1926. We can find no reported case where this Court has reviewed the action of the highest appellate court of a state where the act of a state legislature was brought in question and the decision against the validity of the act. The question appears to be a novel one.

(c) The graduated classification of railroads for levee taxes adopted by the Mississippi State Legislature in the Act of 1926 was reasonable: *Bromley vs. McCaughn*, 280 U. S.————, Adv. Ops. November 25, 1929; *Carley & Hamilton vs. Snook*, 280 U. S. ————, Adv. Ops. February 24, 1930; *Ohio Oil Co. vs. E. A. Conway*, 280 U. S. ——, Adv. Ops., decided April 14, 1930; *Middleton vs. Power & Light Co.*, 249 U. S. 152, 63 L. Ed. 527; *Wilson vs. New*, 243 U. S. 332, 61 L. Ed. 755; *Iron Mountain R. R. Co. vs. Arkansas*, 240 U. S. 518, 60 L. Ed. 776; *Citizens' Telephone Co. vs. Fuller*, 229 U. S. 322, 57 L. Ed. 1206; *C. & O. R. R. Co. vs. Conley*, 230 U. S. 513, 57 L. Ed. 1597; *New York & New Haven R. Co. vs. New York*, 165 U. S. 628, 41 L. Ed. 853; *Dow vs. Beidelman*, 125 U. S. 680, 31 L. Ed. 841; *Chicago & B. R. Co. vs. Cutts*, 94 U. S. 155, 24 L. Ed. 94; Clark vs. *City of Titusville*, 184 U. S. 329, 46 L. Ed. 569; *Magoun vs. Ill. Trust & Savings Bank*, 42 L. Ed. 1037, 170 U. S. 283; *Wing vs. Kirkendall*, 223 U. S. 59, 56 L. Ed. 350; *Watson vs. State*, 254 U. S. 122, 65 L. Ed. 170.

III.

FEDERAL QUESTION—HOW RAISED

(a) The Supreme Court of the State of Mississippi decided the Federal question on the first appeal, Miller State Tax-Collector, vs. Columbus & Greenville Railway Company, 122 So. 866, 154 Miss. 317. Since the Supreme Court of Mississippi decided the Federal question, it will be conclusively presumed that the same was properly raised in accordance with the rules of state practice: *Manhatten Life Ins. Co. vs. Cohen*, 234 U. S. 123, 58 L. Ed. 1245; *Sully vs. American Nat'l Bank*, 178 U. S. 289, 44 L. Ed. 1072; *Chicago, R. I. Ry. Co. vs. Perry*, 259 U. S. 548, 66 L. Ed. 1056.

(b) On remand of the case to the Circuit Court of Montgomery County, Federal questions were presented in pleadings. R. 8 14-15.

(c) On appeal to the Supreme Court of the State of Mississippi, the Federal questions were reasserted in assignment of error. R. 66.

(d) The Supreme Court of the State of Mississippi, Columbus & Greenville Railway Co., vs. Miller, Etc., 127 So. 784, reasserted its original opinion wherein the Federal questions involved were decided.

IV.

STATEMENT OF THE CASE

A full and concise statement of the facts in this case has been set forth in the petition for certiorari, and the same will not be reasserted here. Additional reference will be made to the facts in Paragraph VI.

V.

SPECIFICATION OF ERRORS.

1. The Supreme Court of the State of Mississippi committeed error in affirming the judgment of the Circuit Court of Montgomery County, Mississippi, appealed from, in this case and in rendering final judgment against petitioners upon the 21st day of April, 1930; and in so doing deprived petitioners of their property without due process of law, and denied to them the equal protection of the law provided by the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of the State of Mississippi, in failing and refusing to give to the petitioners the immunity from liability afforded by Chapter 259, Mississippi Laws of 1926, committed error and deprived them of their property without due process of law, and denied them the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

3. The Supreme Court of the State of Mississippi committed error in holding that Chapter 259, Mississippi Laws of 1926, violated the Fourteenth Amendment to the Constitution of the United States, and in holding that the classification of railroads therein provided for the purposes of levee taxation was arbitrary and unreasonable and violative of the Fourteenth Amendment to the Constitution of the United States.

4. The Supreme Court of the State of Mississippi committed error in holding that Chapter 259, Mississippi Laws of 1926, was not a valid and enforcible statute as applied

to the Fourteenth Amendment to the Constitution of the United States and Paragraph 1 thereof, and in holding that the same did not constitute a complete defense on the part of the said petitioners in said cause.

5. The Supreme Court of the State of Mississippi committed error in reinstating and in holding applicable to the petitioners Chapter 282, Mississippi Laws of 1914, and in applying and enforcing the same against the petitioners in this case, and in so doing, brought said Chapter 282, Mississippi Laws of 1914, in conflict with, and caused the same to violate the Fourteenth Amendment to the Constitution of the United States, in that petitioners were thereby deprived of their property without due process of law and denied the equal protection of the law.

6. The Supreme Court of the State of Mississippi committed error, deprived the petitioners of their property without due process of law, and denied to them the equal protection of the law, in affirming the action of the Circuit Court of Montgomery County, Mississippi, in excluding the testimony of J. H. Rigby and Z. P. Hawkins in respect to the very great dissimilarity between the Yazoo & Mississippi Valley Railroad Company, the only other standard guage main line railroad operating in the levee district, and the petitioner, the Columbus & Greenville Railway Company.

7. The Supreme Court of the State of Mississippi committed error in affirming the action of the Circuit Court of Montgomery County, Mississippi, in failing and refusing to permit petitioners to prove that the Railroad Commis-

sion of the State of Mississippi, which classified railroad companies operating in the State of Mississippi, had itself classified the Yazoo & Mississippi Valley Railroad Company as a first class railroad and classified the Columbus & Greenville Railway Company as a third class raidroad, and graduated the classes accordingly.

8. The Supreme Court of the State of Mississippi committed error in applying the Fourteenth Amendment to the Constitution of the United States under the facts in this case to Chapter 259, Mississippi Laws of 1926, thereby depriving the petitioners of their property without due process of law and denying to them the equal protection of the law.

VI.
ARGUMENT.

(a) It is the function of this Court to determine as to whether or not Chapter 259, Mississippi Laws of 1926, violated the Fourteenth Amendment to the Constitution of the United States, which office upon its part, can not be delegated to the State Court.

In this case, appellee, by the allegation of its declaration, and in its brief and argument, attacked certain sections of the Constitution of the State of Mississippi, and urged upon the Supreme Court of the State of Mississippi that Chapter 259, Mississippi Laws of 1926, was void and should be disregarded, and that the Act of 1914, Chapter 282, should be enforced against the petitioners, because it was claimed that such Act of 1926 violated, and was in conflict

with, certain sections of the Constitution of the State of Mississippi. The Supreme Court of the State of Mississippi is the final interpreter of its Constitution and statutes. It gave due consideration to the argument of appellee's counsel and decided that, so far as the Constitution of the State of Mississippi was concerned, Chapter 259, Mississippi Laws of 1926, was a valid law and that, as applied to the Constitution of the State of Mississippi, the Columbus & Greenville Railway Company had paid all the taxes demanded and required of it under its laws; and that Chapter 259, Mississippi Laws of 1926, could not be stricken down by reason of any provision contained in the Constitution of the State of Mississippi. That being true, the Supreme Court of the State of Mississippi then applied the Fourteenth Amendment to the Constitution of the United States and held, as appears from its opinion, that Chapter 259, Mississippi Laws of 1926, was based upon an arbitrary classification.

As to whether or not chapter 259, Mississippi Laws of 1926, violated the Fourteenth Amendment to the Constitution of the United States, and as to whether or not petitioners were deprived of their property without due process of law by the reinstatement and enforcement against them of Chapter 282, Mississippi Laws of 1914, are not matters of state law, but are questions involving a construction of the Fourteenth Amendment to the Constitution of the United States, which can only be finally determined by this Court.

In the case of *Illinois Central R. R. Co., vs. Messina*, 240 U. S. 395, 60 L. Ed. 709, there was presented a case in

which the Supreme Court of the State of Mississippi had decided a question involving interstate commerce. Having decided the question erroneously, this Court felt called upon to reverse the decision, using the following language:

"We are of the opinion therefore that the act was construed wrongly. Assuming, as it has been assumed, that the defendant's liability was governed otherwise by state law, it seems doubtful under the state decisions whether the plaintiff would have been allowed to recover had the court been of opinion that the act of Congress made his presence on the train illegal. *Western U. Teleg. Co., vs. McLaurin*, ——— Miss., ———, L. R. A. 1915C, 487, 66 So. 739. And although there are expressions in the opinion below that raises a doubt, the fact that the supreme court thought it necessary to construe the act indicates that the construction was material to the result. For this reason the judgment must be reversed."

In the case of *Ward vs. Love*, 253 U. S. 17, 64 L Ed. 751, this Court used the following language:

"The right to the exemption was a Federal right, and was specially set up and claimed as such in the petition. Whether the right was denied, or not given due recognition, by the supreme court, is a question as to which the claimants were entitled to invoke our judgment, and this they have done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-Federal grounds of decision that were without any fair or substantial support."

To the same effect, see *Truax vs. Corrigan* 257 U. S. 315, 66 L. Ed. 254.

(b) The classification provided for in Chapter 259, Mississippi Laws of 1926, is reasonable and consistent with the Fourteenth Amendment to the Constitution of the United States.

Chapter 259, Mississippi Laws of 1926, is a legislative classification of railroads for taxation in the levee district for the purpose of creating a fund to construct and maintain levees against the flood waters of the Mississippi River in the district. Submitting the act to an analysis, the classification is as follows:

Class 1. Each and every main or trunk line standard guage railroad more than 25 miles in length, exclusive of side tracks and switches, $350.00 per mile per annum.

Class 2. On each narrow gauge railroad less than standard, exclusive of tracks or switches, not exceeding twenty-five miles in length, $87.50 per mile per annum.

Class 3. Upon each and every standard gauge railroad not operating a trunk line, but operating a railroad used as a feeder or branch of a main or trunk line, less than twenty-five miles, $210.00 per mile per annum.

Class 4. Main line of any railroad which does not own or operate in excess of 25 miles in the Mississippi levee district $50.00 per mile per annum.

The tax being uniform in each class.

It must be borne in mind that the Fourteenth Amendment to the Constitution of the United States does not require equality in taxation; it merely prohibits arbitrary distinctions, which may not be supported from any standpoint upon a reasonable basis. *Shaffer vs. Carter*, 252 U. S. 37, 64 L. Ed. 445; *Ft. Smith Light & Traction Co. vs. Board of Improvement*, 274 U. S. 387, 71 L. Ed. 1112; *Stebbins vs. Riley*, 268 U. S. 137, 69 L. Ed. 884.

In discussing the question of classification, the same may be approached from two standpoints:

(1) The actual situation which existed at the time of the passage of the act of 1926. The proof indisputably showed that there were but two standard guage main line railroads in the levee district at the time of the passage of the act and up to the trial of this case; one the Yazoo & Mississippi Valley Railroad, an interstate carrier, forming part of the great Illinois Central system, operating a railroad from New Orleans in the State of Louisiana to Memphis in the State of Tennessee, running north and south through the entire district, parallel with the Mississippi River, approximately 117.15 miles, its vast properties exposed one hundred per cent. to the hazard of an overflow of the waters of the Mississippi River, requiring superior construction of roadbeds, bridges, trestles, its equipment the last word in modernity, its depots and buildings modern and in excellent state of repair, its locomotive engines propelling freight trains of ninety to one hundred cars, a railroad with a capital stock of approximately Twenty-Five Million Dollars, which is unpurchasable at any price; in other words, a standard modern railroad of vast values and

up to date in every respect, operating over its line a number of passenger and freight trains daily.

(2) The Columbus & Greenville Railway Company, petitioners herein, owning 169 miles of railroad in the State of Mississippi, operating approximately 69 miles, running at right angles from the Mississippi River east and west, approximately 18 miles in the levee district, a railroad which emerged from receivership in 1923, operating its line through a nonproductive hill section of the state, the construction of its road being old, wornout, dilapidated and inferior; its buildings and operating equipment in like condition, its locomotive engines having approximately one-fourth of the propelling capacity of the Yazoo & Mississippi Valley Railroad Company operating through a highly productive delta section; the Columbus & Greenville Railway Company having its western terminus at Greenville, Washington County, Mississippi, in the levee district, only forty per cent. of the district lying north of Greenville, and its exposure to the currents of the Mississippi River proportionately reduced, which required a less efficient and expensive road bed and construction. These facts were introduced without objection, and will appear in testimony of J. H. Rigby, R. 24-44; Z. P. Hawkins, R. 46-50.

In addition to the foregoing facts, the petitioner offered to prove by certified copies of the assessment roll of the Mississippi State Tax Commission, the body having authority to fix values for taxation of railroad properties in Mississippi, that the Yazoo & Mississippi Valley Railroad was assessed for ad valorem taxation in the levee district at thirty-two thousand dollars per mile, and that the Columbus & Greenville Railway Company at one thousand dollars

per mile. This testimony was excluded by the trial court, and the Supreme Court of the State of Mississippi held that the testimony was not relevant or competent.

The railroad Commission of the State of Mississippi was authorized under Chapter 118, Mississippi Laws of 1926, to classify railroads in Mississippi for the purpose of fixing privilege taxes to be paid for the general revenues of the state. A copy of this act is made an appendix hereto. The Railroad Commission classified the Columbus & Greenville Railway Company as a third class railroad and the Yazoo & Mississippi Valley Railroad as a first class railroad. The Supreme Court of the State of Mississippi likewise held this testimony immaterial. We respectfully submit, however, that in determing the constitutionality of the Act of 1926, we are entitled to have the facts excluded treated as established. *Fairmount Creamery vs. Minn.*, 274 U. S. 1, 71 L. Ed. 893. The Court in that case said, page 895:

> "The trial court excluded this evidence as immaterial, and the supreme court approved. We may, therefore, treat the facts stated as though established and held to have no bearing on the question of guilt or the validity of the enactment."

In the case of *Railroad Co., vs. The State*, 70 So. 555, 110 Miss. 299, the Supreme Court of the State of Mississippi held that it was without authority to review the action of the Railroad Commission in classifying railroads, that the question was legislative in nature and not judicial.

There is no constitutional objection to an act under the Fourteenth Amendment to the Constitution of the United

States because applicable only to one company. In other words, the fact that there was but one standard gauge main line railroad operating less than twenty-five miles in the district in no manner rendered the act violative of the Fourteenth Amendment to the Constitution of the United States. *Durham Public Service Co., vs. City of Durham*, 261 U. S. 149, 67 L. Ed. 580.

The case of *Ft. Smith Light & Traction Co., vs. Board of Improvement*, 274 U. S. 387, 71 L. Ed. 1112, involved an act imposing upon a street railway company obligation to pave at its own cost certain streets. The act was general in its nature, but applicable to only one company. On objection thereto as violating the Fourteenth Amendment to the Constitution of the United States, this Court used the following language:

> "If a state may delegate to a municipality power to require paving by a street railway located within its limits, (Durham Pub. Ser. Co. vs. Durham, supra), we perceive no reason why it may not, by a legislative act, make a like requirement limited to a single municipality."

This is in accord with the decisions of the Supreme Court of the State of Mississippi construing its own statutes. In the case of *Memphis & C. Ry. Co. vs. Bullen*, 121 So. 826, 154 Miss. 536, the court used the following language:

> "Where a law is broad enough to reach every portion of the state and to embrace within its provisions every person and thing distinguished by marked characteristics of sufficient importance

to make them clearly a class by themselves, it is not a local or special law, but a general law, 'even though there be but one member of the class or one place on which it operates.' 25 R. C. L., Sec. 66, p. 815, at page 818. In the case of *Toombs vs. Sharkey*, (140 Miss. 676), 106 So. 273, at page 275, the language above quoted from 25 R. C. L., Sec. 66, p. 818, is quoted with approval."

(3) There is still another method of approaching the question, that adopted by the Supreme Court of the State of Mississippi of holding incompetent and irrelevant all evidence relating to the actual situation, and determining the question from a mere inspection of the act itself, though we submit, in the light of the preceding authorities, that we are entitled to have taken as true the facts offered to be proved, and the question of the constitutionality of the act as applied to the Fourteenth Amendment to the Constitution of the United States may be made to depend upon the peculiar facts in each case. *Fairmont Creamery Co. vs. State of Minn.*, 274 U. S. 1, 71 L. Ed. 893; *Truax vs. Corrigan*, 257 U. S. 312, 66 L. Ed. 254; *Shaffer vs. Carter*, 252 U. S. 37, 64 L. Ed. 445; *Wagner vs. Covington*, 251 U. S. 95, 64 L. Ed. 157; *Gilligan vs. Covington*, 251 U. S. 104, 64 L. Ed. 168; *American Mfg. Co. vs. St. Louis*, 250 U. S. 459, 63 L. Ed. 1084.

Passing, however, to the view which was taken by the Supreme Court of the State of Mississippi of the statute as being violative of the Fourteenth Amendment to the Constitution of the United States, we respectfully submit that the state court not only attempted to exclude testimony offered by the Railway Company to show the dissimilarity

in conditions existing between the two carriers, but no evidence of any kind was offered attacking the reasonableness of the classification. We respectfully submit that the burden of proof rested upon the opposing litigant in this case to introduce facts showing the unreasonableness of the classification, and if none appeared, it is only in very rare cases that an act should be declared violative of the Fourteenth Amendment to the Constitution of the United States without the aid of evidence tending to show an improper classification.

See the most admirable address of Justice Harlan F. Stone, Associate Justice of this Court, before the American Bar Association in Seattle, 1928.

In the case of *Ft. Smith Light & Traction Co. vs. Board of Improvement*, 274 U. S. 387, 71 L. Ed. 1112, this Court said:

> "We may not assume in the absence of proof that such differences do not exist. *Erb vs. Morasch*, 177 U. S. 584, 44 L. Ed. 897, 20 Sup. Ct. Rep. 819; *Middleton vs. Tex. P. & L. Co.*, 248 U. S. 152, 63 L. Ed. 527, 39 Sup. Ct. Rep. 227; *Swiss Oil Corp. vs. Shanks*, 273 U. S. 407, 47 Sup. Ct. Rep. 393.
>
> "There are no facts disclosed by the record which would enable us to say that the legislative action with which we are herein concerned was necessarily arbitrary or unreasonable, or justify us in overruling the judgment of the State Court that it was reasonable. *Durham Pub. Service Co., Durham*, supra, (67 L. Ed. 585, 43 Sup. Ct. Rep. 290). Judgment affirmed."

In the case of *Whitney vs. California*, 274 U. S. 357, 71 L. Ed. 1095, this Court said:

> "One who assails the classification must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Lindsley vs. Natural Carbonic Gas Co.*, 220 U. S. 62, 78, 55 L. Ed. 370, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160, and cases cited."

In the case of *Weaver vs. Palmer*, 270 U. S. 402, 70 L. Ed. 654, this Court used the following language:

> "Legislative determinations express or implied are entitled to great right; but it is always open to interested parties to show that the legislature has transgressed the limits of its power. *Pa. Coal Co. v. Mahon*, 260 U. S. 393, 413, 67 L. Ed. 322, 325, 28 A. L. R. 1321, 43 Sup. Ct. Rep. 158. Invalidity may be shown by things which will be judicially noticed. *Quong Wing v. Kirkendall*, 223 U. S. 59, 64, 56 L. Ed. 350, 352, 32 Sup. Ct. Rep. 192), or by facts established by evidence. The burden is on the attacking party to establish the invalidating facts. See Minnesota Rate Cases, (Simpson vs. Shepard), 230 U. S. 352, 452, 57 L. Ed. 1511, 1563, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18.'

In the case of Dominion Hotel vs. State of Arizona, 249 U. S. 265, 63 L. Ed. 597, this Court said:

> "The only question is whether we can say on our judicial knowledge that the legislature of Arizona could not have had any reasonable ground for believing that there were such public considerations for the distinction made by the present law. The deference due to the judgment of the legisla-

ture on the matter has been emphasized again and again. *Hebe Co. vs. Shaw*, 248 U. S. 297, 303 ante, 255, 258, 39 Sup. Ct. Rep. 125. Of course this is especially true when local conditions may affect the answer,—conditions that the legislature does, but that we can not know. *Thomas Cusack Co. vs. Chicago*, 242 U. S. 526, 530, 531, 61 L. Ed. 472, 475, 476, L. R. A. 1918A, 136, 37 Sup. Ct. Rep. 190, Ann. Cas. 1917C, 594."

In the case of *Middleton vs. R. R. Co.*, 249 U. S. 152, 63 L. Ed. 527, this Court said:

> "The burden being upon him who attacks a law for unconstitutionality, the courts need not be ingenious in searching for grounds of distinction to sustain a classification that may be subjected to criticism."

In the case of *Rast, Tax Colector, vs. Vandeman*, 240 U. S. 342, 60 L. Ed. 679, this Court held that if any state of facts could be conceived that would sustain the law, the existence of such facts must be assumed. The Court used the following language:

> "It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78, 55 L. Ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion or serious strength. It is not within the competency of the courts to arbitrate in such contrariety. *C. B. & Q. R. Co. v. McGuire*, 219

U. S. 549, 55 L. Ed. 328, 31 Sup. Ct. Rep. 259; *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 413, 414, 59 L. Ed. 1011, 1022, 1023, L. R. A. 1915C, 1189, 34 Sup. Ct. Rep. 612; *Price v. Illinois*, 238 U. S. 446, 452, 59 L. Ed. 1400, 1405, 35 Sup. Ct. Rep. 892."

As preliminary to the authorities which we shall cite upon the question of classification, we direct the attention of the Court to the rule that classification need not depend on scientific accuracy. *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. Ed. 552.

Nor is the Court, in determining the question, concerned with questions of lack of wisdom, crudeness, impolicy, or even injustice in the state law. *Heath, etc., Mfg. Co. v. Worst*, 207 U. S. 338, 52 L. Ed. 236.

We now propose to show the Court that very great latitude is allowed a state legislature in the matter of classification; that it is only necessary that such classification be not arbitrary and not without reasonable basis; that this rule is especially applicable and more liberal as applied to the internal taxation laws of a state.

In the case of *Bromley v. McCaugn, Collector of Revenue*, 280 U. S.——, Adv. Ops. Nov. 25, 1929, this Court used the following language:

> "It is suggested that the schemes of graduation and exemption in the present statute, by which the tax levied upon donors of the same total amounts may be affected by the size of the gifts to individual donees, are so arbitrary and unrea-

sonable as to deprive the tax payer of property without due process. But similar features of state death taxes have been held not to infringe the 14th Amendment, since they bear such a relation to the subject of the tax as not to 'preclude the assumption that the legislature in enacting the taxing statute, did not act arbitrarily or without the exercise of judgment or discretion which rightfully belong to it'. *Stebbins v. Riley*, supra, (268 U. S. 145, 69 L. Ed. 889, 44 A. L. R. 1454, 45 Sup. Ct. Rep. 424). No more can they be a basis for holding that the graduation and exemption features of the present statute violate the 5th Amendment."

In the case of *Carley & Hamilton v. Snook*, 280 U. S. ——, Adv. Ops., Feb. 24, 1930, there was involved the construction of an act of the State of California, imposing a tax upon motor vehicels, which exempted from the operation of the act such vehicles weighing less than three thousand pounds. The classification was justified in the following language:

"Only a word need be said of petitioner's contention that the exemption of all vehicles weighing less than 3000 pounds, although their loaded weight may be much more than vehicles not exempt, infringes the equal protection clause of the 14th Amendment and the similar Sec. 21 of Article 1 of the State Constitution. That the legislature may graduate the fees according to the propensities of the vehicles to injure or to destroy the public highways, and may exempt those with respect to which this tendency is slight or nonexistent, can not be doubted. We may not assume that weighing less than 3000 pounds, with loads which

they usually carry, are not of this class, or that vehicles weighing more than 3000 pounds with their accustomed burden added do not have this tendency. It is for the legislature to draw the line between the two classes.

In the case of *Stebbins v. Riley*, 268 U. S. 137, 69 L. Ed. 884, this Court upheld the validity of a statute fixing inheritance tax which refused to permit deduction of amount paid the Federal Government for inheritance tax as applied to residuary legatees.

In the case of *Iron Mountain R. R. Co. v. Arkansas*, 240 U. S. 518, 60 L. Ed. 776, there was presented to the court for review an act of the State of Arkansas, which forbade a railroad company from conducting switching operations across public highways in cities of first and second class, with a switching crew of less than one engineer, a fireman, a foreman and three helpers. The act exempted therefrom railroads less than one hundred miles in length. The court held the classification was reasonable, using the following language:

> "The other grounds are in effect disposed of by prior decisions.
>
> "In the case of *Chicago, R. I. & P. R. Co. v. Arkansas*, 219 U. S. 453, 55 L. Ed. 290, 31 Sup. Ct. Rep. 275, a statute of Arkansas was considered which required freight trains to be equipped with crews consisting of an engineer, a foreman, a conductor and three brakemen 'regardless of any modern equipment or automatic couplings and air brakes.

"The statute did not apply to railroads whose line or lines did not exceed fifty miles in length, nor to any railroad, regardless of length of its line, where the freight train should consist of less than twenty-five cars. The statute was sustained on the authority of prior cases against charges of conflict with the 14th Amendment and the Commerce Clause of the Constitution. We need not cite the cases relied on or repeat the argument of the court. In that case, as in this, there was controversy in the testimony and the contentions of the parties as to the necessity of the statute. It was held, however, that the conroversy did not establish that the statute was an arbitrary exercise of power. *Armour & Co. v. North Dakota*, 240 U. S. 510, ante, 771, 36 Sup. Ct. Rep. 440."

The validity of the graduated Federal income tax was affirmed by this Court in *Tyee Realty Co. v. Anderson*, 240 U. S. 115, 60 L. Ed. 554; *Brushaber v. Union Pac. R. R. Co.*, 240 U. S. 1, 60 L. Ed. 493.

In the case of *Wilson v. New*, 243 U. S. 323, 61 L. Ed. 755, Congress passed an act establishing a permanent eight hour standard for a day's work for employees engaged in the operation of trains upon interstate railway carriers, and providing for a temporary wage regulation. The act exempted railways independently owned and not exceeding one hundred miles in length, electric street railways and electric interurban railways, from the operation of the act. The court said:

"The want of equality is based upon two considerations. The one is the exemption of certain

short line and electric railroads. We dismiss it because it has been adversely disposed of by many previous decisions."

In the case of *Citizens Teleph. Co. v. Fuller*, 229 U. S. 322, 57 L. Ed. 1206, the legislature of the State of Michigan imposed a tax on telephone companies, but exempted those whose gross receipts did not exceed $500.00 per annum. The court held that the classification was proper, using the following language:

> "It may therefore be said that in taxation there is a broader power of classification than in some other exercises of legislation. There is certainly as great a power, and the rule appellant urges can not be adopted. It is inconsistent with the principle of classification and the cases which have explained the principle and the range of its legal exercise.
>
> "In *Bell's Gap R. R. Co. v. Pa.*, 134 U. S. 232, 33 L. Ed. 892, 10 Sup. Ct. Rep. 533, it was decided that under the power of classification there might be exemption of property, dependent upon its species, and the rates of excise might be varied upon different trades and products. And it was said that it was safe to say 'that the 14th Amendment was not intended to compel the state to adopt an iron rule of taxation.' It was pointed out that to give it that effect would destroy the constitutional provision and laws of some of the states which, while enjoining uniformity of taxation, permitted exceptions which were deemed material and that 'it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of

needed and useful industries, and the discouragement of intemperance and vice; and which every state, in one form or another, deems it expedient to adopt'."

In the case of *C. & O. Ry. Co. v. Conley, Atty. Gen.*, 230 U. S. 513, 57 L. Ed. 1597, there was presented for review a statute of the State of West Virginia regulating the fare to be charged by carriers for passengers. The act did not embrace railroads of less than fifty miles in length. This Court held that the classification was reasonable, using the following language:

> "Whether the classification shall be according to the amount of passengers and freight carried or of gross or net earnings during a previous year or according to the simpler and more constant test of the length of the line of the railroad is a matter within the discretion of the legislature. If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws."

In the case of *New York & New Haven R. R. Co. v. New York*, 165 U. S. 628, 41 L. Ed. 853, there was presented to the court for review a New York statute prohibiting a railroad company operating in the state to use stoves or furnaces inside of or suspended from passenger cars. The act excluded from the operation thereof railroads less than fifty miles in length. This Court justified the classification, using the following language:

> "In any event, there is no such discrimination against companies having more than fifty miles

of road as to justify the contention that there has been a denial to the companies named in the act of the equal protection of the laws. The statute is uniform in its operation upon all railroad companies doing business in the state, of the class to which it is made applicable."

In the case *of Erb, Receiver, v. Morasch*, 177 U. S. 584, 44 L. Ed. 897, Kansas City, Missouri, passed an ordinance regulating the speed of railroad trains in the municipality. The ordinance excluded from the operation thereof a transit railway company operated by a steam dummy engine. This court justified the classification and held the act valid.

In the case of *Clark v. Titusville*, 184 U. S. 329, 46 L. Ed. 569, this Court had under review an ordinance of a municipality in a city in Pennsylvania, imposing a license tax upon persons carrying on certain occupations in the city. Persons in different occupations paid different amounts, and persons in the same occupation were classified by maximum and minimum sales. The Court justified the classification, using the following language:

"Manifestly, there was inequality between the members of different classes, and that was conceded in the opinion, but as manifestly there was equality between the members of each class, and that equality was held to satisfy the 14th Amendment to the Constitution of the United States; and the reasoning by which that conclusion was supported is applicable to the case at bar. We met the contention accurately and squarely that there was no reasonable distinction between the classes."

In the case of *Magoun v. Ill. Trust & Sav. Bank*, 170 U. S. 283, 42 L. Ed. 1037, this Court held that an act of the State of Illinois classifying taxes for inheritance tax on difference between lineal and collateral relationship to the decedent was based upon substantial distinction and not arbitrary. The court also held that granting statutory exemptions to estates of certain sizes and amounts was a proper classification, and that the act did not violate the 14th Amendment to the Constitution of the United States.

In the case of *Watson v. Comptroller of the State*, 254 U. S. 122, 65 L. Ed. 170, this Court held that an inheritance tax law which imposed an additional tax of five per cent. upon certain investments held by the decedent, which investments were not subject to general property taxation, was based upon proper classification. This Court said that it was not necessary that the basis for classification be deducible from the nature of the things classified.

In the case of *Chicago, R. I. R. Co. v. Arkansas*, 219 U. S. 453, 55 L. Ed. 290, the State of Arkansas passed an act requiring a minimum of three brakemen for a freight train, but excluded from the operation of the act railroads less than fifty miles in length.

In the case of *Dow v. Beidelman*, 125 U. S. 680, 31 L. Ed. 841, the legislature of Arkansas passed a statute fixing the rates to be charged by railroad companies, dividing the companies into classes upon a mileage basis. This court held that there was no more reasonable, proper or consistent method of classifying a railroad than that of a mileage basis, using the following language:

"Whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings, during a previous year, or according to the simpler and more constant test of the length of the line of the railroad, is a matter within the discretion of the legislature. If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provisions securing to all the equal protection of the laws."

When we turn to state decisions, we find that classification of railroads upon a mileage basis also has some historic background. In the case of *Eureka Pipe Line Co. v. Halliman*, (W. Va.), 105 S. E. 506, the legislature of West Virginia passed an act imposing an occupation tax upon pipe lines for transporting oil and gas. According to the classification, the lines were divided into those under and equaling ten miles. The lines under ten miles were exempt from taxation, the court used the following language:

"It is uniformly held that notwithstanding, by the Constitution of a state, taxes must be levied by equal and uniform laws, and that the equal protection of the laws is guaranteed by the Fourteenth Amendment of the Federal Constitution, a state in the exercise of its taxing power may classify the subjects of taxation within its limits, and so long as the classification thus made have a reasonable basis for their existence, and the tax imposed upon each member of each class is uniform, the same does not violate such constitutional limitations," citing cases. "And, as declared by the Supreme Court of the United States in *Citizens' Telephone Co. v. Fuller*, supra, the power to classify for the purpose of taxation is broad-

er than such power of classification when exercised for other legislative purposes."

The case was reversed by this Court in *Eureka Pipe Co. v. Hallinan*, 257 U. S. 265, 66 L. Ed. 227, on entirely other grounds.

In the case of *Consumers' League v. Colorado R. Co.*, 125 Pac. 577, 53 Colo. 54, the Supreme Court of Colorado upheld an act of the State of Colorado regulating rates of carriers, which exempted from its operation railroads not exceeding twenty miles in length. The editor's note to the case indicates the prevalence of such legislation.

In the case of *Railway Co. v. Ark.*, 174 S. W. 223, the Supreme Court of Arkansas held an act valid providing for a full crew, which excluded small railroads therefrom.

The same legislation finds its place in the statutes of Mississippi. Sections 7906-7908, Hemingway's 1927 Code, requiring railroads to equip engines with headlights, exempting from the operation of the act small railroads; Sections 9278-9281 of the same Code prohibiting engines from backing in the night exempt from the operation thereof carriers engaged in hauling lumber; Sections 9284-9286, Hemingway's 1927 Code, known as the full crew law, exempt from the operation thereof railroads not over fifty miles in length. These statutes are set out in the appendix.

As a matter of fact, there will not be found in this country any case, state or federal, invalidating a statute classifying railroads upon a mileage basis. Upon the other

hand, as said by this Court in *Dow v. Beidelman*, supra, (125 U. S. 680, 31 L. Ed. 841), a classification according to a mileage basis is the simplest and most constant; therefore, the most satisfactory.

Excluding any question of the evidence introduced or offered touching the actual facts in respect to the two railroad companies involved, then, the question must be determined upon the philosophy stated by this Court in *Rast Tax Collector v. Vandeman*, supra, (240 U. S. 342, 60 L. Ed. 679): "If any state of facts reasonably can be conceived that would sustain it, then the existence of that state of facts at the time the law was enacted must be assumed."

The legislature of the State of Mississippi might very reasonably have come to the conclusion (1) that since the width of the levee district did not exceed twenty-five miles, any railroad not exceeding twenty-five miles in length would run at right angles to the river, and not parallel with it; (2) that running at right angles, such railroad would very likely come into the City of Greenville, the only city of any importance in the district; (3) that such railroad would derive its revenue from a less productive, hill section of the state, a territory presenting some geographical difficulties for construction and operation; (4) that since the road ran at right angles and not parallel to the river and running through the district, the size of the road bed as well as the character of the construction thereof would not require the same resistance to the flood waters of the Mississippi River; (5) That since the perils from the river lie principally in exposure to currents, a railroad running at right angles to the Mississippi River, coming into Greenville, Miss., or

probably any other point, would not be exposed one hundred per cent. to the current incident to the flood waters in case of a break; (6) that as an incident to small mileage, the income per mile would be proportionately reduced in the levee district; (7) that as an incident to a short railroad, the value of the property exposed to the flood waters would be vastly and proportionately reduced.

The foregoing are only a few of the differences which might suggest themselves to the legislature of the State of Mississippi in providing the classification which it did. It must be borne in mind that the classification is uniform and applicable to all cases falling within the different classifications.

CONCLUSION.

We respectfully submit that the decision of the Supreme Court of Mississippi is contrary to every decision of this or any other court dealing with the subject-matter. The questions presented are novel, in that this Court has never passed upon a case where the state court held an act invalid as violating the Fourteenth Amendment to the Constitution of the United States. The question is important, was erroneously decided, and we therefore respectfuly submit that the case is one calling for the exercise by this court of its supervisory power in order that petitioners may not be denied their rights, privileges, and immunities granted to them by Paragraph 1 of the Fourteenth Amendment to the Constitution of the United States, and that they be not denied the benefit of the immunity from further liability afforded by Chapter 259, Mississippi Laws of 1926, on the ground of

the invalidity of the same under said amendment to the Constitution of the United States; and, to that end, that a writ of certiorari should be granted, and this Court should review the decision of the Supreme Court of the State of Mississippi and reverse it.

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APPENDIX

Chapter 118, Miss. Laws, 1926, Sec. 7740, Hemingway's 1927 Code.

7740. Railroads.—186. Section 3856 of Chapter 114 of the Code of 1906, levying privilege taxes on railroads, be and the same is hereby amended so that for the purpose of levying a privilege tax on railroads, such railroads are divided into four classes: 1st, 2nd, 3rd and narrow gauge, and privilege taxes levied on them as follows:

On each railroad of the first class, per mile	$45.00
On each railroad of the second class, per mile,	25.00
On each railroad of the third class, per mile,	10.00
On each narrow gauge railroad, per mile,	2.50

The railroad commission shall, annually, on or before the first Monday in August, classify the several railroads according to their charter and the gross earnings of each, and the privilege taxes thereon shall be paid on or before the first day of December, and the findings of the said railroad commission shall be certified to the auditor of public accounts and the chancery clerk of the county through which each road or roads run; and any person or persons, natural or artificial, who shall exercise any of the privileges taxed herein, without first paying the tax and procuring the tax or license, as required by law, shall be subject to the pains and penalties imposed by Section 3894 of the Code of 1906, and to such other pains and penalties as may be otherwise provided by law. (Laws 1926, Chap. 118. In effect April 30, 1926).

APPENDIX

Sections 7906-7908, 9278-9281, 9284-9286, Hemingway's 1927 Code.

Section 7906. To require railroads to equip engines with headlights in certain cases.—1. All railroad companies, operating or doing business in this state, are hereby required to equip and maintain each and every locomotive used by such companies to run on its main line, between sunset and sunrise, with a good and sufficient headlight, which shall consume not less than three hundred watts at the arc, and with a reflector not less than eighteen inches in diameter, and to keep the same in good condition. The word "main line," as used herein, means all portions of the railway line not used as yards, spurs and side tracks. (Laws 1912, Ch. 153. In effect January 1, 1913).

Section 7907. Penalty for violations of this act.—2. Any railroad company violating this act in any respect shall be liable to indictment as for a misdemeanor in any county in which the locomotive not so equipped and maintained may run, and on conviction, shall be punished by a fine of not less than twenty-five dollars, nor more than five hundred dollars for each offense. (Laws 1912, Ch. 153. In effect January 1, 1913).

Section 7908. Not to apply to tramroads of logging railroads.—3. Provided this act shall not apply to tramroads, mill roads and roads engaged principally in lumber or logging transportation in connection with mills, nor to railroad systems under thirty miles long not running regular night schedules, nor to any engine, the lighting equipment of which shall have failed during the trip, if it is shown that the equipment was in efficient and effective

working condition when the trip was begun, nor to switch engines going to and returning from wrecks, or sent out on the main line to bring into a terminal a train, the engine of which has become disabled. (Laws 1912, Ch. 158. In effect January 1, 1913).

Section 9278. To prohibit backing of engines at night without light and pilot.—1. It shall be unlawful for any person or corporation owning or operating a railroad as a common carrier of passengers and freight for hire in the state, to require or permit a locomotive engine to be backed on his or its line of railroad, in the night time, unless it is provided and equipped with a pilot and headlight on the rear of its tender. (Laws 1908, Ch. 95. In effect March 16, 1908).

Section 9279. Not to apply to logging railroads. Provided, however, that the provisions of this act shall not apply to railroads whose principal business is hauling logs, nor to locomotive engines running for coal or water, doubling hills, returning from trains when broken into, going to or returning from trains in the yard limits of terminal stations, nor to engines engaged in regular switching service in yards or road engines switching at intermediate stations; nor to any locomotive engines in cases of washouts, wrecks, or when going to the assistance of engines so disabled as to block the main track of a railroad. (Laws 1908, Ch. 95. In effect March 16, 1908).

Section 9280. Penalty for violation of this act.—2. Any person or corporation violating the provisions of this act shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $100 nor

more than $1000, and in addition thereto any person giving an order, permitting or requiring an employee of any railroad to violate the provisions of this act shall be guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment in the county jail not less than ten nor more than thirty days. (Laws 1908, Ch. 95. In effect March 16, 1908).

Section 9281. Damages for injuries resulting from violation of the provisions of this act shall be liable for injury or damage caused to any person by reason thereof, notwithstanding the negligence of the party injured or damaged. (Laws 1908, Ch. 95. In effect March 16, 1908).

Section 9284. Full crew law.—Prescribing number of employees for a train crew.—1. It shall be unlawful for any railroad propelled by steam doing business in the State of Mississippi, to operate or run over its lines, or any part thereof, or suffer or permit to be run over its lines, or any part thereof, outside of the yard limits, any passenger, mail or express train carrying passengers, or any freight train which is not manned with a crew consisting of one engineer, one fireman, one conductor, one brakeman or porter and one competent flagman. (Laws 1914, Ch. 170. In effect March 5, 1914).

Section 9285. Penalty for operating with short crews. —2. Any railroad company doing business in the State of Mississippi who shall send out on its road, or cause to suffer or permit to be sent out on its road, or any part thereof, outside of the yard limits, any train of the classes enumerated in Section 1, which is not manned in accordance with the provisions of that section, shall be guilty of a misde-

meanor, and upon conviction thereof, shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1000.00) for each offense. (Laws 1914, Ch. 170. In effect March 5, 1914).

Section 9286. Act not to apply in certain cases.—3. Nothing in this act shall be held as applying to any case of disaster or disability of any members, or members, of the crew arising while out on the road between division terminals, or to relief trains, or wrecking trains where men are not available; provided, this act shall not apply to branch or independent roads not over fifty miles in length. (Laws 1914, Ch. 170. In effect March 5, 1914).

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

NO. 195

COLUMBUS & GREENVILLE RAILWAY CO., ET AL.,

Petitioners,

VS.

W. J. MILLER, STATE TAX COLLECTOR, Etc.,

Respondent.

Petitioner's Response to Respondent's Brief in Opposition to Application for Writ of Certiorari

---

W. H. WATKINS,
A. F. GARDNER, Sr.,
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

NO. 195

COLUMBUS & GREENVILLE RAILWAY COMPANY, ET AL.,

Appellants.

VS.

W. J. MILLER, State Tax Collector, Etc.,

Appellee.

Petitioner's Response to Respondent's Brief in Opposition to Application for Writ of Certiorari

This case is before the Court on petition for writ of certiorari, for the reason that the supreme court of the state of Mississippi erroneously decided that chapter 259 Mississippi laws 1926 violated the fourteenth amendment to the constitution of the United States, thereby depriving the petitioners of that immunity from liability which it had under chapter 259 Mississippi laws 1926, based on petitioners' claim that the same was valid and consistent with the fourteenth amendment to the constitution of the United States. And the case is also before the court on the petitioners' appeal from the judgment of the supreme court of the state of Mississippi wherein it not only held that chapter 259 Mississippi laws 1926 violated the fourteenth amendment to the

constitution of the United States, but over the objection of petitioners that chapter 282 Mississippi laws 1914 violated the fourteenth amendment to the constitution of the United States if revived and enforced against it under the facts in this case, held that said act of 1914 was in full force and effect by reason of the invalidity as applied to the fourteenth amendment of the act of 1926 and enforced and applied the same under the facts of this case against petitioner. Petitioners, in compliance with the rules of this Court, filed a statement of the gounds of jurisdiction on which the appeal was predicated, to which statement respondent's counsel have made no response. However, respondent's counsel have replied to petitioners' brief accompanying application for writ of certiorari, in reply to which we respectfully submit as follows:

1st.

Decision Does Not Rest on Question of State Law.

The supreme court of the state of Mississippi did not base its decision upon any construction of the constitution of the state of Mississippi. Upon the other hand, without reference to the constitution of the state of Mississippi, it held that the act in question violated the fourteenth amendment to the constitution of the United States, and, therefore, was void upon its face. The rule contended for by opposing counsel has no application except where the decision of the state court is put upon a federal and a non-federal ground, and if the non-federal ground is broad enough to sustain the judgment, this court will not review the federal question. See *McCoy v. Shaw*, 277 U. S. 302, 72 L. ed. 891, and cases

therein cited. In the case of *Illinois Central vs. Messina*, 240 U. S. 395, 60 L. ed. 709, this court held that wherever the supreme court of the state thought it necessary to construe a federal act, it indicated that such construction was material to the result. So in this case, the supreme court of the state of Mississippi did not mention the state constitution but expressly put its decision upon the fourteenth amendment to the federal constitution, it conclusively indicated that the supreme court of the state of Mississippi thought such construction necessary to reach the result which it did. The decision of the supreme court of the state of Mississippi legally amounts to the announcement that in so far as the constitution of the state of Mississippi was concerned, the act of 1926 did not violate any portion thereof. Section 14 of the Bill of Rights of the state of Mississippi contains the following language:

> "No person shall be deprived of life, liberty or property except by due process of law."

There is no provision, however, prohibiting a denial of the equal protection of the law. The provision is patterned after the fifth amendment to the constitution of the United States, which is controlling upon congress while the fourteenth amendment to the constitution of the United States, is applicable only to state legislation. *Hodges v. U. S.* 203 U. S. 1, 51 L. ed. 61. *Twining vs. New Jersey*, 211 U. S. 78, 53 L. ed. 97; *Thorington v. Montgomery*, 147 U. S. 490, 37 L. ed. 252. The fourteenth amendment to the constitution of the United States prohibits deprivation of property without due process of law by a state, as well as the denial of the equal protection of the law, whereas the four-

teenth section of the bill of rights of the state of Mississippi deals only with deprivation of property without due process of law, which has a fixed meaning in the jurisprudence of this country. *Civil Right Cases*, 109 U. S. 3, 27 L. ed. 835; *Simon v. Craft*, 182 U. S. 427, 45 L. ed. 1165; *Hovey v. Elliott*, 167 U. S. 409, 42 L. ed. 215. To be deprived of the equal protection of the law means all persons are not treated alike under the same circumstances. *Leefer v. Texas*, 139 U. S. 462, 35 L. ed. 225. *Quaker City Cab Co. v. Pa.*, 277 U. S. 389, 72 L. ed. 927.

Counsel for respondent call attention to the fact that in the state court they urged upon the supreme court of the state of Mississippi that the act of 1926 violated section 234 of the Mississippi constitution, which is found on page 32 of Counsel's brief. The constitutional provision prohibits the passage of any law affecting the taxation or revenue in a levee district unless and until the act shall have been published as required therein. This was the constitutional question urged before the supreme court of the state of Mississippi. It had been thoroughly settled, however, by the supreme court of the state of Mississippi in a long line of cases that the court could not look beyond the enrolled bill passed by the legislature to determine as to whether or not such notice had been published. The leading case upon the subject from the supreme court of Mississippi was *Ex Parte Wren*, 63 Miss. 512. The case was referred to with approval by this Court in the opinion of Mr. Justice Harlan in *Marshall Field & Co. v. Clark*, 134 U. S. 649, 36 L. ed. 294. Other cases from the supreme court of Mississippi directly in point are *State Ex Rel v. Jackson*,

119 Miss. 729, *Adams, Rev. Agt. v. Noble*, 103 Miss. 393; *Postal Telg. Co. v. Shannon*, 91 Miss. 476, *Hunt v. Wright*, 70 Miss. 307, *Swan v. Buck*, 40 Miss. 269, *Riley v. Ammon*, 143 Miss. 861, *Royal Ins. Co. v. Levee Commissioners*, 95 Miss. 168, *Telg. Co. v. Robertson*, 116 Miss. 204.

2nd.

Respondent's Case Distinguished.

In the case of *Chicago & St. Paul Railway Co. v. Westby*, 178 Fed. 619, there was a law providing for employers liability. It dealt with the police power and not the taxation power of the state.

In the case of *Citizens Telegraph Co. v. Fuller*, 229 U. S. 322, 57 L. ed. 1206, this Court said:

> *"It may therefore be said that in taxation there is a broader power of classification than in some other exercises of legislation."*

We can best illustrate our position by differentiating the case of *Fiscal Court of Owen County v. Cox Co.* (Ky.) 117 S. W. 269 21 L. R. A. (N. S.) 83, where the state of Kentucky placed a tax of $75.00 on the use of each three-horse wagon and a tax of $200 on each four-horse wagon operated for business. The proof in the case showed, however, that the distinction was arbitrary; that the operator of a four-horse wagon could not haul any more freight or earn any more income and had no substantial advantage of a three-horse wagon.

The case of *A. & P. Tea Co. v. Doughton*, 196 N. C. 145,

illustrates the point. In that case a tax was measured upon the number of stores, intending to reach chain stores. The tax was imposed upon the operator of more than five stores. The proof showed, however, that there were singly operated stores which (a) carried larger stocks of goods; (b) exceeded five stores in gross sales; (c) that the net profit as applied to gross sales had no relation to the number of stores, therefore, the classification based on the number of stores was arbitrary.

In the present case, however, we have a very different situation. Counsel concede that the tax is for the purpose of raising funds for the construction and maintenance of levees along the Mississippi river. In other words, the tax is for the purpose of constructing a local improvement and is assumed to be measured by the benefit recived. Even if it should be said that mere mileage alone was not sufficient, the petitioners have not rested their case merely on the question of mileage. They have shown the very great diversity in circumstances and situation as applied to the petitioner railroad company for the purpose of showing that it was impossible for it to receive the same proportion of benefit from the construction and maintenance of the levee system as the Yazoo and Mississippi Valley Railroad Company. (a) Its earning power is infinitely less. (b) The construction of its railroad is infinitely inferior. (c) Its dangers to the overflows of the Mississippi River are vastly less since it runs east and west and approaches the river north of the center of the district, and has approximately only a 40% exposure. (d) The benefits to be derived on the part of the Yazoo and Mississippi Railroad Com-

pany as compared with the petitioner railroad company are out of all proportion to that received by the Columbus & Greenville Railway Company. (e) The value of the roadbed of the railway company petitioner is one-thirty-second of the Yazoo and Mississippi Valley Railroad Company. See agreement of counsel, R. 70. (f) The Columbus & Greenville Railway Company was classified by the Mississippi Railroad Commission under chapter 118 Mississippi laws 1926 (petition for writ of certiorari—R. p. 44) as a third class railroad, while the Yazoo & Mississippi Valley Railroad was classified as a first-class railroad (R. 43).

In in this case we are not confronted with a situation where the classification is justified merely on number of miles. We have number of miles plus other facts establishing conclusively the totally disproportionate benefits which the petitioner railroad company would be expected to receive from the construction and maintenance of the levee within the district.

Respondent's counsel, page 15, make the following statement:

> "The classification in the case at bar is based solely upon a mileage basis. The value of the railroad property, the business done, the gross earnings, the direction of the railroad, its closeness to the river, or even the number of years in operation are not taken into consideration."

In this counsel are in error. Petitioner offered to prove and proved the vast dissimilarity between petitioner railroad company in the district and that of the Yazoo and

Mississippi Valley Railroad Company operated in the district.

The case of *Southern Railway Co. v. Green*, 216 U. S. 400, 54 L. ed. 536, was a case where a tax was imposed upon a foreign corporation, and no such tax imposed upon a domestic corporation. The classification was, of course, arbitrary. The tax in this case is uniform as to each class.

The case of *Mary L. Milheim et al. v. Moffat Tunnel Improvement District*, 262 U. S. 710, 67 L. ed. 1194, bears no relation to the present case. In that case a state legislature had created a tunnel improvement district and assessed the costs thereof upon land-owners within the district. The case turned upon the question as to whether or not the use was a public one. The state court so decided and this court affirmed the decision. This court further held that there was no arbitrary classification in including certain lands within the district. There is nothing in the case to throw the slightest light upon the question involved in this controversy.

In *Myles Salt Co. v. Iberia, etc.*, 239 U. S. 478, 60 L. ed. 392, this court held that the establishment of a drainage district, which includes lands not susceptible to benefit by the district, was an improper inclusion, and denied to the interested parties constitutional rights.

In the case of *Gulf, C. & S. F. R. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, the court dealt with an act relating to the police power of a state and not with the taxation pow-

er, and the case throws no light upon this controversy.

The case of *Edward Voight v. City of Detroit*, 184 U. S. 115, 46 L. ed. 459, dealt entirely with the question as to what kind of notice was due process of law in making assessments for benefits. The case bears no relation whatever to the present case.

The case of *Carles U. Cotting v. Godard*, 183 U. S. 79, 46 L. ed. 92, dealt with the exercise of the police power of the state, and had nothing to do with the taxation power. Besides, the statute restricted the charges which should be made by certain corporations for receiving and selling live-stock, whereas no similar charge was made on other corporations engaged in a similar line of business. This court held that merely the amount of business done was not a proper classification. In the present case, however, we have demonstrated that the Columbus & Greenville Railroad Company was of inferior construction and incapable of rendering the same character of service as the Yazoo and Mississippi Valley Railroad Company, and that it could not possibly receive the same benefit and protection from the levee system did the Yazoo and Mississippi Valley Railroad Company.

Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32, 72 L. ed. 770, was a case in which this court held that a Kentucky statute basing the fee for recording mortgages upon the maturity of the indebtedness was not a sufficient but was an arbitrary classification. Under the act of 1926, however, the classification of the Columbus & Greenville Railroad Co. is shown to be reasonable and proper.

The case of *Thos. Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. ed. 679, dealt with the police power of the state to prevent an illegal combination. The case was not a taxation case. This court simply held that since the statute prohibited combinations on the part of certain persons and permitted the same combinations on the part of producers, the act was void.

In the case of *Nashville, C. & S. Ry. Co. v. Taylor*, 86 Fed. 168, was a case which involved a discriminatory ad valorem assessment of property for taxation by a local taxing board. The property of the railroad company was sought to be taxed at 100% of its value, while other property was assessed at a much lower valuation. The cases are not parallel, but we might say that is exactly what we are trying to do in this case, to prevent an enforcement of the statute which taxes the petitioner's railroad company at a rate of taxation out of proportion to the benefits received.

The case of *Shaefer v. Carter*, 252 U. S. 237, 64 L. ed. 445, simply dealt with the constitutionality of a state income tax and bears no relation whatever to the questions involved in this case.

3rd.

Effect of This Classification.

Counsel argue that the act of 1926 placing a tax of $50 per mile on the Columbus and Greenville Railway Co. within the district discriminates against the Yazoo and Mississippi Valley Railroad Company. (a) Counsel states that a narrow gauge railroad company would have to pay $87.50

per mile for the privilege of operating its line in the district, whereas the petitioner would pay $50. There are a number of replies to this contention, one which we deem sufficient is that the record with exhibits undisputedly shows that there are no narrow gauge lines of railroad in the district. The court will find attached to the record and briefs a map showing the railroad mileage in the Mississippi levee district. A comparison of this map with the classification (R. 43) and the appendix to petitioner's original brief on page 44 will demonstrate that the only two railroads in the district and the only two which were in the district at the time the act was passed, were the Yazoo and Mississippi Valley Railroad and the Columbus and Greenville Railway, neither of which are narrow gauged roads. There will be no dispute upon this question. This contention was therefore foreclosed adversely to the respondent in the case of *Crescent Cotton Oil Co. v. State of Mississippi*, 257 U. S. 129, 66 L. ed. 166, wherein the court used the following language:

> "The record before us shows that before the law assailed was enacted, cotton gins had been operated in Mississippi by individuals as well as by corporations, but there is no showing that oil mills and cotton gins were both operated by an individual or by groups of individuals."

(b) We are entitled to have the validity of the act of 1926 in respect to the fourteenth amendment measured by a comparison with the main line of the Yazoo and Mississippi Valley Railroad Company.

In the case of *C. & O. Ry. Co. v. Atty.-Gen'l*, 230 U. S. 513, 57 L. ed. 1597, the court used the following language:

"If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws."

There are only two standard gauge main lines of railroad in the levee district: one is the Yazoo and Mississippi Valley Railroad, and the other is the Columbus & Greenville Railway; and as to whether or not the act of 1926 is discriminatory, such discrimination must be determined by a comparison of its relation to the Yazoo and Mississippi Valley Railroad, since those two railroads are in the same class and are the only ones in the district of the same class. See *Quaker City Cab Co. v. Pa.*, 277 U. S. 389, 72 L. ed. 927; *Louisville Gas & Elec. Co. v. Coleman*, 277 U. S. 32, 72 L. ed. 770. And it may be noted by reference to the classification had by the Railroad Commission (R. 43) that the Columbus & Greenville Railway Co. is the only main line railroad in the state of Mississippi classified as No. 3; and the supreme court of the state of Mississippi has decided that this classification is binding upon it. *R. R. Co. v. State*, 110 Miss. 290 discussed in original brief page 25.

Opposing counsel take the position that there are certain branch lines in the district which will pay $210.00 per mile, although the Columbus & Greenville Railway Company is only required to pay $50 per mile. There are a number of replies to this proposition. *First*, branch lines are in an entirely separate class from main lines, and, as above stated, the question of discrimination must be determined by the uniformity or lack thereof as applied to classes. *Second*, it must be noted that the branch lines referred to are feed-

ers for the great interstate carrier, the Yazoo and Mississippi Valley Railroad Company, which, from an inspection of the map forming part of the record in this case, discloses a perfect network of main and branch lines in the levee district. In the evidence offered by the petitioner in the trial court in respect to the superior construction, earning capacity, enormous values exposed to the hazards of the Mississippi river, etc., the evidence introduced and offered dealt both with the Yazoo and Mississippi Valley Railroad Company and its branch lines (R. 16-42), and the agreement of counsel showing that the petitioner railroad company property was assessed for ad valorem taxes at $1,000 a mile, and that of the Yazoo and Mississippi Valley Railroad Company $32,000 per mile, was applicable to both the main and the branch lines (R. 70). Therefore, the branch lines of the Yazoo and Mississippi Valley Railroad Company forming part of the great network of the great Yazoo and Mississippi Valley system, fall into an entirely different class from the Columbus and Greenville Railway Company.

Counsel make special reference to the line running from Rosedale to Cleveland. Returning to Record page 43, classification of the Railroad Commission, we find that line, designated as Rosedale to Dockery, as a main line, and is classified as No. 2 railroad. When we return to the branch line from Kelso to Holly Bluff, while it is a branch line, it is a feeder of the great Yazoo and Mississippi Valley Railroad Company. An examination of the map shows that it is located at the extreme south end of the district and is exposed to the flood water of the Mississippi River 100%, and, therefore, demands the full measure of protection on the part of the levee district.

Again we call Your Honors' attention to the fact that the Yazoo and Mississippi Valley Railroad Company is not objecting to the payment of such privilege tax as may be imposed upon it for the construction and maintenance of the Mississippi river levee, as compared with the tax imposed upon plaintiff in error, and we submit that the respondent, W. J. Miller, state tax collector of the state of Mississippi, cannot be heard to question the validity of any such tax, as to which we submit the following authorities:

Officer must have personal interest in controversy before he can raise a federal question. *Stewart v. Kansas*, 239 U. S. 14, 60 L. ed. 120; *Smith v. State of Indiana*, 191 U. S. 138, 48 L. ed. 125; *Caffrey v. Oklahoma*, 177 U. S. 346, 44 L. ed. 799.

Opposing counsel criticize our classification, original brief 22, and state that the provision Act of 1926 providing for a maximum tax of $50.00 per mile on minimum mileage not to exceed twenty-five miles within the district does not include narrow gauge or branch lines. The Supreme Court of Mississippi has never passed upon this point. However, the position is not material. We have shown that there are no narrow gauge railroads in the district, and that such branch or feeder lines as may be in the district form part of the great Yazoo & Mississippi Valley Railway System, which fall in a separate and distinct class. The petitioner railway company likewise falls in a separate class. It is an independent intrastate main line, without any trunk line affiliation and without branches. Its physical condition, lack of earning power, infinitely lower vaulation and diminished exposure to the flood waters of the Mississippi

River not only justifies but requires different classification from that of the main line of the Yazoo & Mississippi Valley Railroad and /or its branches.

4th.

Petitioner's Position Not Inconsistent.

Respondent's counsel claim that the position of petitioners is inconsistent. This is not true, as will appear from what is said in our original reply brief. Upon the other hand, petitioners' position is clear and consistent. *First*, that the act of 1926 is valid, does not violate the fourteenth amendment to the constitution of the United States, and since the petitioner, the railroad company, had discharged the liability imposed thereunder, it was, under the fourteenth amendment, entitled to immunity from further liability. *Second*, that irrespective of this question, the imposition of the same tax, towit, $350 per mile, on the petitioner railroad company as is imposed upon the main line of the Yazoo and Mississippi Valley Railroad Company, taking into consideration the disproportionate earning power, property values and exposure to flood waters from the Mississippi River on the part of petitioner railway company, would cause said chapter 282 Laws 1914 to violate the fourteenth amendment to the constitution of the United States.

5th.

Act of 1926 Only Partially Repealed.

Counsel claim that the act of 1926 was only partially repealed. We are not concerned with the discussion as to whether or not the act was wholly or partially repealed. The

supreme court of Mississippi held the act of 1926—at least that portion of it applicable to petitioner—as being violative of the fourteenth amendment to the constitution of the United States. Of that petitioner complains. The court then reinstated the act of 1914 and enforced it under the facts and circumstances of this case against petitioner, which was violative of the fourteenth amendment of the constitution of the United States, and of which petitioners complain.

Counsel state that the Yazoo and Mississippi Valley Railroad Company is a foreign corporation. While such would not be material, this is an incorrect statement. This court will take judicial notice that the Yazoo and Mississippi Valley Railroad Company is a Mississippi corporation. *Y. & M. V. R. R. Co. v. Adams*, 180 U. S. 1, 45 L. ed. 395. *The same v. Board of Levee Commissioners*, 132 U. S. 190, 33 L. ed. 308. *The same v. Brewer*, 231 U. S. 245, 58 L. ed. *The same v. Clarksdale*, 207 U. S. 10, 66 L. ed. 104.

Opposing counsel have cited no case in any manner militating against the rights asserted by plaintiffs in error herein. It will readily appear to the Court that the questions involved are novel and of such importance as to justify the issuance of a writ of certiorari.

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CHARLES ELMORE CROPLEY
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

COLUMBUS & GREENVILLE RAILWAY COMPANY, ET AL.,

Appellants

V.

W. J. MILLER, STATE TAX COLLECTOR, FOR THE USE OF THE MISSISSIPPI LEVEE DISTRICT,

Appellee.

NO. 195

BRIEF FOR APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM.

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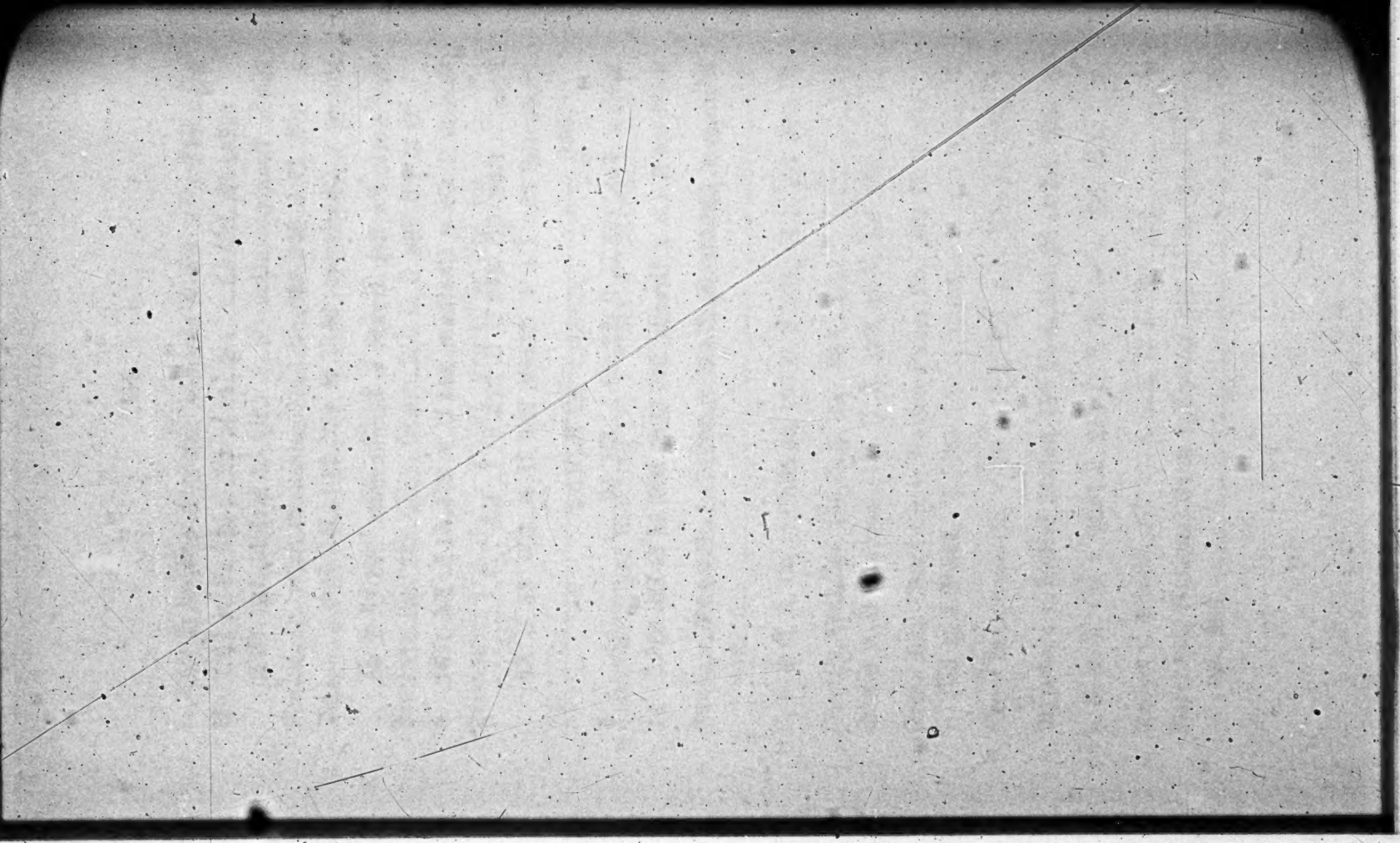
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

COLUMBUS & GREENVILLE RAILWAY COMPANY, ET AL,

Appellants

V.

W. J. MILLER, STATE TAX COLLECTOR, FOR THE USE OF THE MISSISSIPPI LEVEE DISTRICT,

Appellee.

NO. 195

BRIEF FOR APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM.

The Appellee moves to dismiss the appeal and affirm the judgment of the Supreme Court of the State of Mississippi, appealed from in this case, on the ground that the appeal was prosecuted by Appellants by reason of the enforcement against them of Chapter 282, Mississippi Laws 1914; it being the position of Appellee's counsel that the judgment against the Appellants was rendered by the Supreme Court of the State of Mississippi under Chapter 259, Mississippi Laws 1926 and not Chapter 282, Mississippi

Laws 1914. Appellee's counsel take the position that the Supreme Court of the State of Mississippi did not hold the entire act of 1926 unconstitutional but merely held that the provision thereof, levying a privilege tax of fifty dollars ($50.00) per mile on railroads in the district, the mileage of which did not exceed twenty-five miles, was void and unconstitutional; and that therefore the remaining portion of the act of 1926 was left in full force and effect; and that the Appellants should have appealed from the enforcement of the act of 1926 and not the act of 1914.

A mere statement of the situation will disclose the weakness of Appellee's position. On July 1, 1928 the Appellee, State Tax Collector, for the use of the Mississippi Levee District, exhibited his declaration in the Circuit Court of Montgomery County, Mississippi. R. 1. The suit was not brought under the act of 1926 but was predicated under the act of 1914. The Plaintiff's declaration alleged that under the act of 1914 the Appellant Railway Company became liable to pay a privilege tax of three hundred and fifty dollars ($350.00) per mile. The declaration alleged that the Appellant Railway Company had paid taxes under Chapter 259, Mississippi Laws 1926; but that such act of 1926 was unconstitutional as violating Section 234 of the Constitution of the State of Mississippi, requiring the publication of bills before the legislature affecting the taxation or revenue of the Mississippi Levee District. Said Section 234, Article 11, Mississippi State Constitution of 1890, is set out in brief for respondent in this case, on page 32. It was the position of the Appellee and his declaration alleged that the act of 1926 was utterly void and therefore suit was predicat-

ed under Chapter 282, Mississippi Laws of 1914. The Plaintiff's declaration showing on its face that the Appellant Railway Company had discharged all liability imposed on it under Chapter 259 Mississippi Laws 1926, The Railway Company filed a demurrer to the Plaintiff's declaration claiming complete immunity under the act of 1926 and by reason of the fact that the Plaintiff's declaration by its averments disclosed that the Railway Company had made all the payments required of it under such act. The trial court sustained the demurrer of the Railway Company and dismissed the suit; and on appeal to the Supreme Court of the State of Mississippi the decision of the Circuit Court of Montgomery County, Mississippi, was reversed. The Supreme Court of the State of Mississippi using the following language: (154 Miss. 323.)

> "Chapter 259, Laws of 1926, divides railroads into two classes: First, railroads having not more than twenty-five miles of railroad in the levee district; and, second, all other railroads therein. The ground of the appellant's contention is that this classification has no reasonable relation to the purpose for which the statute was enacted, but is arbitrary and unreasonable, and therefore in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution. This is so manifestly correct that the citation of authorities therefor would be supererogatory. It will not be necessary for us to decide whether this results simply in the proviso of chapter 259, Laws of 1926, being void, or in the whole statute being void, for in either event the tax which the appellee will have to pay will be the same; that is, three hundred fifty dollars per

annum on each mile of its railroad in the levee district."

The Supreme Court of the State of Mississippi did not say that the act of 1926 was valid as to any part; it did not say that the act was not totally void. In view of the fact that the Appellee was suing under the act of 1914, which was identical in terms and legal effect, it said that such question was not necessary to decision since the Plaintiff, Appellee, could recover under the provisions of the act of 1914. The case went back to the Circuit Court of Montgomery County for trial, the Appellee did not amend his declaration and sue under the Act of 1926 but tried the case under the allegations of the declaration predicating liability of the Railway Company under the act of 1914 on the theory that the act of 1926 was void. Recovery was had thereunder over the constitutional objection of the Appellants that the act of 1926 was a valid, legislative enactment, consistent with the fourteenth amendment to the Constitution of the United States; that to revive the act of 1914 and enforce it against the Railway Company in this case would deprive it of its property without due process of law; and that the act of 1914, if enforced against the Railway Company in this case, violated the fourteenth amendment to the Constitution of the Uunited States in that the Appellant Railway Company was deprived of its property without due process of law and denied the equal protection of the law. Recovery was had by the Appellee in the Circuit Court of Montgomery County, Mississippi, which recovery was affirmed by the Supreme Court of the State of Mississippi, 127 So. 784.

In other words, the Appellee predicated his right to recovery not under the act of 1926 but under the act of 1914 and recovery was had thereupon. Chapter 259, Laws of 1926, appeared in the case only defensive. The Appellant Railway Company claimed that the payments made thereunder constituted a complete defense to further liability on its part.

We respectfully submit that the Appellee cannot be heard in this Court or in any other court to say that Chapter 282, Mississippi Laws of 1914, was not enforced against the Appellant Railway Company in this case. Suppose that instead of prosecuting the appeal based upon the enforcement of the act of 1914 against it the Appellants had assigned as error the action of the court in enforcing the act of 1926. The Appellee would have replied thereto, with a motion to dismiss, that the suit was predicated under the act of 1914; that the liability of the Appellant in the declaration was alleged to be under the act of 1914 that recovery was had thereon and that no suit was ever brought by the Appellee under the act of 1926.

We respectfully submit that the Appellee, having invoked the act of 1914, and predicated the liability of the Appellant Railway Company thereunder, and having procured a judgment against the Appellant Railway Company under the allegations of its declaration, is now estopped to say that the act of 1914 is not involved in this case. The authorities are well settled that whenever a litigant successfully maintains a position before any tribunal, such litigant cannot thereafter controvert the correctness of the ruling invoked. *Davis vs. Wakelee*, 156 U. S. 680, 39 L. Ed. 578;

Robb vs. Vos, 155 U. S. 13, 39 L. Ed. 52; *Ingraham vs. United States*, 155 U. S. 434, 39 L. Ed. 213; *Merchants National Bank vs. Sexton*, 228 U. S. 634, 57 L. Ed. 998; *Norfolk Railway Co. vs. Chatham*, 244 U. S. 276, 61 L. Ed. 1131; *Pease vs. Engineering Co.*, 243 U. S. 273, 61 L. Ed. 715; *Banker Trust Co. vs. Raton*, 258 U. S. 328, 66 L. Ed. 642.

As a matter of fact, however, eliminating from the act of 1926 that portion thereof levying a tax of fifty dollars ($50.00) per mile on railroads having a mileage in the Levee District of not over twenty-five miles, the two acts are identical in language and legal effect. We attach as appendix to this brief each of the acts, underscoring the language of the act of 1926 found objectionable by the Supreme Court of Mississippi. The acts being identical in language and legal effect, and since the objection of the Appellants was predicated on the enforcement of an act imposing a privilege tax of three hundred and fifty dollars ($350.00) per mile against it, the question of the number of the act or date is not one of vital importance. It was the language and legal effect of the act which was complained of.

Appellee, however, is not in any position to say that it did not recover under the act of 1914 and therefore is not in a position to say that the act of 1914 was not involved in this case.

THE QUESTION PROPERLY PRESENTED

The Appellant Railway Campany in the Circuit Court of Montgomery County, Mississippi, seasonably interposed

objection to the act on account of the alleged unconstitutionality thereof. See R. 5-10. The constitutional objection was again presented in the Supreme Court of the State of Mississippi. Assignment of error, R. 47. The decision of the Supreme Court of the State of Mississippi was an affirmation of its previous decision, holding the act of 1926 unconstitutional and enforcing the act of 1914 over the objection of the Appellant Railway Company, in respect to its violating the fourteenth amendment to the Constitution of the United States in the particulars therein set out. It may therefore be assumed that the Appellant Railway Company properly raised the federal question relied on for a reversal in this case.

STATUTE NECESSARILY INVOLVED.

In order to confer jurisdiction upon this Court by appeal, it is only necessary that the question of the invalidity of the State Statute be raised in the State Court and either expressly decided or necessarily involved. If properly presented and necessarily involved it is immaterial that the State Court does not predicate its judgment upon that ground. *New York Ex Rel. Bryant vs. Zimmerman*, 278 U. S. 63, 73 L. Ed. 184; *Melton vs. O'Neal*, 275 U. S. 212, 72 L. Ed. 245; *Home Insurance Co. vs. Dix*, 74 L. Ed. Advance sheet 485; *Whitney vs. California*, 274 U. S. 357, 71 L. Ed. 1095; *Green Canal Co. vs. Patten Paper Company*, 172 U. S. 58, 43 L. Ed. 364; *Dewey ys. Des Moines*, 173 U. S. 193, 43 L. Ed. 665; *C. B. & Q. R. R. Co. vs. Chicago*, 166 U. S. 226, 41 L. Ed. 979; *Murray vs. Charleston*, 96 U. S. 432, 24 L. Ed. 760.

MOTION TO DISMISS ON THE MERITS

Appellee's counsel have not urged the Court to dismiss the appeal or affirm the case on the merits in the motion. Anticipating the possibility of the Court treating the motion filed as one to that end, we submit the following authorities upon that point.

In the case of *Mobile Transportation Company vs. City of Mobile*, 187 U. S. 479, 47 L. Ed. 266, this Court held that a motion to dismiss and affirm will not be sustained unless the federal questions involved are frivolous and undeserving of notice.

In the case of *L. & N. R. R. Co. vs. Melton*, 218 U. S. 36, 54 L. Ed. 921, it is held that a motion to dismiss and affirm will not be sustained on the ground that the question has been foreclosed where analysis and exposition are necessary in order to make clear the decisive effect of such prior decision, upon the issue presented.

In the case of *Mo. Pac. R. R. Co. vs. Larabee*, 234 U. S. 459, 58 L. Ed. 1398, it is held that a motion to dismiss and affirm will not be sustained where the federal question presented is not obviously frivolous.

1. *Federal Question Presented not Devoid of Merit.*

The position of the appellants in this case is not inconsistent, as stated by appellee's counsel. The position of appellants has always been, and is now, that the Act of 1926 is and was a valid legislative enactment under the Four-

tenth Amendment to the Constitution of the United States; that wide latitude is allowed a state legislature in classifying property for taxation; that the legislature of a state may even exempt from taxation altogether certain classes of property. *American Sugar Refining Co. vs. State of Louisiana*, 179 U. S. 89, 45 L. Ed. 102.

Aside from the question, however, as to whether under all circumstances a mileage classification for taxation of railroads is valid, the dissimilarity in (a) value; (b) earning power; (c) exposure to hazard from the flood waters of the Mississippi River; (d) location, construction, etc., between the Columbus & Greenville Railway and any other main line standard gauge railroad in the district, justified the classification. To that position the appellants have consistently adhered, and still urge upon the Court.

However, when the Supreme Court of the State of Mississippi held that the Act of 1926 was invalid, and that the Act of 1914 was enforceable against it, with perfect consistency the appellant took the position that owing to the dissimilarity in conditions existing in the levee district as to the Yazoo & Mississippi Valley Railroad Company and the Columbus & Greenville Railway Company, the only two standard gauge main lines in the district, and owing to the fact that the Columbus & Greenville Railway was rated as a third class railroad and the Yazoo & Mississippi Valley Railroad as a first class railroad, the Yazoo & Mississippi Valley Railroad Company's property was assessed for thirty-two times per mile as much as that of the appellant railway company, that a mere mileage classification was arbitrary and void, and that the tax was further discriminatory

in that no fair opportunity for doing justice was presented, because the Columbus & Greenville Railway Company was not in position to have and receive benefits accruing to it from the construction and maintenance of levees as would be enjoyed by the Yazoo & Mississippi Valley Railroad Company's standard main line. In other words, that the conditions as to these two standard main lines were so dissimilar that the placing of the same tax per mile upon the Columbus & Greenville Railway as was placed upon the Yazoo & Mississippi Valley Railroad was arbitrary, unjust and discriminatory. See authorities Statement of Jurisdiction page 13.

In passing upon the Act of 1926, the Supreme Court of the State of Mississippi said that a mileage classification was invalid under the Fourteenth Amendment to the Constitution of the United States without regard to the dissimilarity existing as to a road operating not exceeding twenty-five miles in the district. However, when we come to the Act of 1914, the Supreme Court of the State of Mississippi holds that the classification of standard gauge main lines for taxation upon a mileage basis is valid under the Fourteenth Amendment to the Constitution of the United States, regardless of the dissimilarity in conditions and benefits to be received. It is perfectly apparent that the inconsistency is in the rule announced by the Supreme Court of the State of Mississippi in the case. It can not be right twice. The classification of a standard gauge main line on a mileage basis can not be void as violating the Fourteenth Amendment in one instance and be good in the next instance regardless of the dissimilarity in conditions.

The appellants in this case do not stand merely upon the question of classification upon a mileage basis, but show in connection with the mileage dissimilar conditions which not only jutify but require different legislative classification. In other words, the Columbus & Greenville Railway Company, the appellant, owing to the many dissimilar conditions between it and the only other standard gauge main line in the district required a separate and different classification. *Southern Ry. Co. v. Green,* 216 U. S. 400, 54 L. Ed. 536.

This Court, of course, may determine on appeal questions which otherwise would be reviewable by certiorari, where a substantial federal question is presented justifying an appeal. *Prudential Insurance Co. vs. Cheek,* 259 U. S. 530, 66 L. Ed. 1044.

We respectfully submit that appellee's motion to affirm should be over-ruled, jurisdiction on appeal sustained, and appellant's petition for writ of certiorari granted.

Respectfully submitted,

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APPENDIX.

CHAPTER 282

House Bill No. 179.

AN ACT to amend chapter 125 of the acts of 1908, entitled "An act to amend chapter 7 of the acts of 1886, entitled an act to provide for the payment of levee taxes by railroads in the Mississippi levee district of the State, approved March 5, 1908.

Mississippi levee district; railroad taxes; act 1908 *amended.*

Section 1. Be it enacted by the Legislature of the State of Mississippi, That chapter one hundred and twenty-five of the acts of 1908 be and the same is hereby amended so as to read as follows:

That chapter 7 of the acts of 1886 be and the same is hereby amended so as to read as follows:

That for the purpose of contributing to the expense of building, maintaining and repairing levees in the Mississippi levee district, and of paying the debts and liabilities incurred therefor, by the board of Mississippi levee commissioners, the following tax is hereby levied and assessed upon all railroads and parts of railroads lying and situated in the said levee district, to-wit: Upon each and every mile of the main or trunk line of all broad or standard gauge railroads, not including side tracks or switches, the sum of $350.00 per annum; upon each and every mile of narrow gauge railroad or railroads of less width than standard gauge, not including side tracks or switches, the sum of $87.50 per annum; and upon each and every mile of broad or standard

gauge railroads, not used and operated as a main or trunk line, but constituting and used as a feeder to a branch of a main or trunk line, or to connect such main or trunk line, with some other system, the sum of $210.00 per annum; provided, that no railroad or branch railroad shall be subject to taxation under this act while the same is in process of construction, but if any part thereof shall be used for profit, that part so used shall be taxed, although the whole of said railroad or branch may not be finished.

Taxes to be paid over by railroad treasurer of levee board.

Sec. 2. That said taxes shall be paid by the person or corporation owning or operating said railroads to the treasurer of said Mississippi levee district on or before the first day of November in each year; but upon roads hereafter constructed such a tax be payable in one year, only upon so much of said railroads as shall have been used for profit prior to the first day of February in that year.

If taxes not paid when due, ten per cent damages to accrue.

Sec. 3. That if said tax is not paid when due, then ten per cent damages shall accrue thereon, and upon affidavit filed with the circuit court clerk of Washington county, by the treasurer of the board of Mississippi levee commissioners, stating the amount of tax due and unpaid and the railroad in default, said clerk shall issue a writ to the sheriff of Washington county of the sheriff of such other county in said levee district as may be necessary, stating in such writ the amount of tax due of and the damages thereon, and directing said sheriff to sell so much of said railroad as may be in his county, in the same manner, at the same place,

and upon the same notice and terms as is prescribed by law for sale of real estate under execution, for the tax and costs due on said railroad, and said sheriff shall forthwith pay over the amount so collected to the treasurer of said levee board, and shall execute a deed to the purchaser and at once place him in possession of said railroad.

When board reduces other taxes, proportionate reduction to be made in these taxes.

Sec. 4. That whenever, under the power conferred by law upon said board of levee commissioners, any reduction is made in their other taxes, then said board shall make a proportional reduction in the taxes assessed by this act for that year, and shall notify the railroad company or other person operating said railroad of such reduction.

Sec. 5. That this act take effect and be in force from and after its passage.

Approved February 28, 1914.

CHAPTER 259

SENATE BILL NO. 137.

AN ACT to amend section 1, chapter 282, laws of Mississippi, 1914, so as to reduce the tax on certain lines of railroad in the Mississippi levee district.

Mississippi levee district tax on certain lines of railroads reduced.

Section 1. Be it enacted by the Legislature of the State of Mississippi, That section 1, of chapter 282, laws of Missis-

sippi 1914, be, and the same is hereby amended so as to read as follows:

That for the purpose of contributing to the expense of building, maintaining and repairing levees in the Mississippi levee district, and of paying the debts and liabilities incurred thereof, by the board of Mississippi levee commissioners, the following tax is hereby levied and assessed upon all railroads and parts of railroads lying and situated in the said levee district, to-wit: Upon each and every mile of the main or trunk line of all broad or standard gauge railroads, not including side tracks or switches, the sum of $350.00 per annum; upon each and every mile of narrow gauge railroad or railroads of less width than standard gauge, not including side tracks, or switches, the sum of $87.50 per annum; and upon each and every mile of broad or standard gauge railroads, not used and operated as a main or trunk line, but constituting and used as a feeder to or a branch of a main or trunk line, or to connect such main or trunk line with some other system, the sum of $210.00 per annum; provided, that no railroad or branch railroad shall be subject to taxation, under this act while the same is in process of construction, but if any part hereof shall be used for profit, that part so used shall be taxed, although the whole of said railroad or branch may not be finished; *provided further that the tax per mile per annum on the main line of any railroad company which does not own in excess of twenty-five miles of railroad in the Mississippi levee district shall be* $50.00 *per annum.*

Sec. 2. That this act shall take effect and be in force from and after its passage.

Approved March 2, 1926.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

NO. 195.

COLUMBUS & GREENVILLE RAILWAY CO., ET AL., Petitioners and Appellants,

VS.

W. J. MILLER, STATE TAX COLLECTOR, Respondent and Appellee.

STATEMENT AND BRIEF FOR PETITIONERS AND APPELLANTS.

Wm. H. WATKINS,
A. F. GARDNER, Sr.
R. C. STOVALL,
A. F. GARDNER, Jr.
H. T. ODOM,
Attorneys for Petitioners and Appellants.

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In The Supreme Court of The United States

OCTOBER TERM, 1930.

NO. 195.

COLUMBUS & GREENVILLE RAILWAY CO., ET AL., Petitioners and Appellants,

VS.

W. J. MILLER, STATE TAX COLLECTOR, Respondent and Appellee.

STATEMENT AND BRIEF FOR PETITIONERS AND APPELLANTS.

B.

REFERENCE TO OPINIONS, SUPREME COURT OF THE STATE OF MISSISSIPPI.

W. J. Miller, State Tax Collector, v. Columbus & Greenville Railway Co., 154 Miss. 317, 122 So. 366; *Columbus & Greenville Railway Co. v. W. J. Miller, State Tax Collector*, 127 So. 784.

C.

STATEMENT OF JURISDICTION.

Paragraph 1, Rule 12, has heretofore been complied with. Authorities in support of the Court's jurisdiction on appeal will be hereinafter set out.

D.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

The Mississippi Levee District was organized, Chapter 1, Miss. Laws of 1865. The territory comprised therein included the counties of Washington, Bolivar and Issaquena. Due to the creation of new counties, it now also comprises parts of Sharkey, Warren ad Humphreys Counties.

Sections 236 and 237 of the Mississippi State Constitution are in the following language:

> "Section 236. The legislature shall impose for levee purposes, in addition to the levee taxes heretofore levied or authorized by law, a uniform tax of not less than two nor more than five cents an acre per annum upon every acre of land now or hereinafter embraced within the limits of either or both of said levee districts. The taxes so derived shall be paid into the treasury of the levee board of the district in which the land charged with the same is situated; and the legislature, by the act imposing said tax, shall authorize said levee boards to fix the annual rate of taxation per acre within the limits aforesaid, and thereby require said levee boards, whenever a reduction is made by them in their other taxes, to make a proportionate reduction in the acreage tax hereinbefore mentioned; but said acreage tax shall not be reduced below two cents an acre per annum; and all reductions in such taxation shall be uniform in each of said districts; but the rate of taxation need not be the same in both of them; and

such specific taxes shall be assessed on the same assessment roll, and collected under the same penalties, as the ad valorem taxes for levee purposes, and shall be paid at the same time with the latter. And no levee board shall ever be permitted to buy lands when sold for taxes; but the state shall have a prior lien for taxes due thereto. The legislature may provide for the discontinuance of the tax on cotton, but not in such manner as to affect outstanding bonds based on it, and on the discontinuance of the tax on cotton, shall impose another tax in lieu thereof; but the legislature may repeal the acreage tax required to be levied hereby after the first day of January A. D. 1895."

"Section 237. The legislature shall have full power to provide such system of taxation for said levee districts as it shall, from time to time, deem wise and proper."

The Columbus & Greenville Railway Company is a Mississippi corporation, hereinafter referred to as the company, operating a line of railroad from Columbus, Mississippi, in a westerly direction to Greenville, Washington County, Mississippi, a distance of 169 miles. It runs across the levee district at right angles from the Mississippi River, a distance of 18.41 miles.

Section 1, Chapter 282, Mississippi Laws of 1914, is in the following language:

"Section 1. Be it enacted by the Legislature of the State of Mississippi, That Chapter one hundred and twenty-five of the Acts of 1908, be and the same is hereby amended so as to read as follows:

"That Chapter 7 of the Acts of 1886 be and the same is hereby amended so as to read as follows:

"That for the purpose of contributing to the expense of building, maintaining and repairing levees in the Mississippi levee district, and of paying the debts and liabilities incurred therefor, by the Board of Mississippi Levee Commissioners, the following tax is hereby levied and assessed upon all railroads and parts of railroads lying and situated in the said levee district, to-wit: Upon each and every mile of the main or trunk line of all broad or standard gauge railroads, not including side tracks or switches, the sum of $350.00 per annum; upon each and every mile of narrow gauge railroad or railroads of less width than standard gauge, not including side tracks or switches, the sum of $87.50 per annum; and upon each and every mile of broad or standard gauge railroads, not used and operated as a main or trunk line, but constituting and used as a feeder to a branch or a main or trunk line, or to connect such main or trunk line with some other system, the sum of $210.00 per annum; provided that no railroad or branch railroad shall be subject to taxation under this act while the same is in process of construction, but if any part thereof shall be used for profit, that part so used shall be taxed, although the whole of said railroad or branch may not be finished."

The legislature of the State of Mississippi, owing to matters and things hereinafter set out, was doubtless of the opinion that under the act of 1914, the Columbus &

Greenville Railway Company was being required to contribute a disproportionate amount to the expense of building, maintaining and repairing levees in the Mississippi levee district and in discharging the obligations thereof. Accordingly, in 1926, the following act was passed:

"Mississippi levee district tax on certain lines of railroad reduced.

"Section 1. Be it enacted by the Legislature of the State of Mississippi, That Section 1, of Chapter 282, Laws of Mississippi, 1914, be, and the same is hereby amended so as to read as follows:

"That for the purpose of contributing to the expense of building, maintaining and repairing levees in the Mississippi levee district, and of paying the debts and liabilities incurred thereof, by the board of Mississippi levee commissioners, the following tax is hereby levied and assessed upon all railroads and parts of railroads lying and situated in the said levee district, to-wit: Upon each and every mile of the main or trunk line of all broad or standard gauge railroads, not including side tracks or switches, the sum of $350.00 per annum; upon each and every mile of narrow gauge railroad or railroads of less width than standard gauge, not including side tracks or switches, the sum of $87.50 per annum; and upon each and every mile of broad or standard gauge railroad not used and operated as a main or trunk line, but contributing and used as a feeder to or a branch of a main or trunk line, or to connect such main or trunk line with some other system, the sum of $210.00 per annum; provided, that no railroad or branch railroad shall be subject to taxation, un-

der this act while the same is in process of construction, but if any part thereof shall be used for profit, that part so used shall be taxed, although the whole of said railroad or branch may not be finished; provided further that the tax per mile per annum on the main line of any railroad company which does not own in excess of twenty-five miles of railroad in the Mississippi levee district shall be $50.00 per annum."

That for the years 1926 and 1927, since the main line of the Columbus & Greenville Railway Company did not exceed twenty-five miles in the levee district, it paid to the tax-collector the sum of $50.00 per mile per annum, in accordance with the provisions of the act of 1926. R. 45-46.

The respondent, W. J. Miller, State Tax Collector, for the use of the Mississippi Levee District, is an officer whose duty it is under the statutes of the State of Mississippi to enforce payment of past due taxes and other obligations to the State of Mississippi, or any subdivision thereof, including the Mississippi Levee District.

Upon the 31st day of July, 1928, the state tax collector filed suit in the Circuit Court of Montgomery County, Mississippi, for the recovery of privilege taxes for the years 1926 and 1927, payable to the Mississippi Levee District under Chapter 282, Mississippi Laws of 1914, aforesaid, at the rate of $350.00 per mile. The plaintiff alleged that Chapter 259, Mississippi Laws of 1926, was invalid, in that the same was adopted by the Legislature of the State of Mississippi in disregard of Section 234 of the Constitution of the State of Mississippi. R. 1.

To which declaration the company demurred on the ground that the plaintiff's declaration revealed that it had discharged all liability for privilege taxes imposed upon it by Chapter 259, Mississippi Laws of 1926, which repealed Section 1, Chapter 282, Mississippi Laws of 1914.

The trial court sustained the demurrer and dismissed the action.

On appeal by the state tax collector to the Supreme Court of the State of Mississippi, the court held that Chapter 259, Mississippi Laws of 1926, violated the Fourteenth Amendment to the Constitution of the United States, and was void, and that the company owed to the levee district the mileage tax provided in Chapter 282, Mississippi Laws of 1914, less payments made. The case is reported, *Miller, State Tax Collector, v. Columbus & Greeenville Railway Co.*, 122 So. 366, 154 Miss. 317. The court used the following language at page 323:

> "Chapter 259, Laws of 1926, divides railroads into two classes: First, railroads not having more than twenty-five miles of railroad in the levee district; and, second, all other railroads therein. The ground of the appellant's contention is that this classification has no reasonable relation to the purpose for which the statute was enacted, but is arbitrary and unreasonable, and therefore in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution. This is so manifestly correct that the citation of authorities therefore would be supererogatory. It will not be necessary for us to decide whether this results simply in the pro-

viso of Chapter 259, Laws of 1926, being void, or in the whole statute being void, for in either event the tax which the appellee will have to pay will be the same, that is, three hundred and fifty dollars per annum on each mile of its railroad in the levee district."

The case was remanded to the Circuit Court of Montgomery County, Mississippi, among other defenses, the company pleaded that Chapter 259, Mississippi Laws of 1926, was consistent with the Fourteenth Amendment to the Constitution of the United States and a valid law thereunder. R. 5.

Said plea contained the following additional language:

> "The said defendant having discharged its liabilities to said Mississippi Levee District under said act, now sets up, alleges and avers that it has acquired, and now has, under the Fourteenth Amendment to the Constitution of the United States, the right, privilege and immunity from further liability for taxes to the said Mississippi Levee District."

The company's plea further alleged that to hold Chapter 259, Laws of 1926, invalid and enforce Chapter 282, Mississippi Laws of 1914, under the facts and circumstances shown by the testimony, against the company, would render such last mentioned act violative of the Fourteenth Amendment to the Constitution of the United States, in that the same would deprive the company of due process of law and deny to it the equal protection of the law. R. 10-11.

At the trial of the case the railway company proved

and offered to prove that at the time of the passage of the act of 1926, and up to the date of the trial of the case, there were but two standard gauge main lines of railroad in the Mississippi Levee District; one, the Yazoo & Mississippi Valley Railroad, an interstate carrier, forming part of the Illinois Central system, operating a railroad extending from New Orleans in the State of Louisiana to Memphis in the State of Tennessee, which railroad extended north and south through the entire levee district parallel with the Mississippi River, approximately 117.15 miles. That it had properties of enormous values, exposed one hundred per cent. to the hazard of an overflow of the waters of the Mississippi River. That said railroad was of modern construction; its road bed, bridges, trestles and equipment were new and modern; its shops, depots and buildings were new and in excellent state of repair; its locomotive engines propelled freight trains carrying ninety to one hundred cars; it was capitalized at approximately twenty-five milion dollars, the capital stock of which could not be purchased at any price; it was a standard modern railroad, up to date in every respect, operating over its line daily each way a large number of passenger and freight trains. The Columbus and Greenville Railway Company operating one hundred and sixty nine miles of railroad in the State of Mississippi, running at right angles from the Mississippi River east and west approximately eighteen miles in the levee district, its western terminus at Greenville, Mississippi. It had been placed in the hands of a receiver about the year 1920 and was reorganized in the year 1923. It operated its line of railroad after leaving the levee district through a non-productive hill section of the state. The condition of

its road was old, worn out, dilapidated and inferior; its buildings and operating equipment old and antiquated; the road bed was from four to six feet lower than that of the Yazoo & Mississippi Valley Railroad, and from two to four feet narrower; its locomotives were all second-hand; its rolling stock was old except four gas engines; its rails were light, its bridges of inferior construction; and, owing to the construction of the road, it was necessary to use two engines, which could only propel twenty-seven to twenty-nine freight cars; its capacity to handle freight was not more than one-fourth that of the Yazoo & Mississippi Valley Railroad; its shop equipment and machinery shops contained old and worn out machinery; its passenger coaches were dilapidated and second-hand; its locomotives were about forty years old. That only forty per cent. of the levee district lay north of Greenville. That the hazard to a railroad from the flood waters of the Mississippi River comes from the current brought about by a break in the river north of the line; that floods south of the line would inflict no serious damage. Testimony of J. H. Rigby, R. 16-34; Z. P. Hawkins, R. 34-38.

Under Chapter 118, Miss. Laws of 1926, being Section 7740 of Hemingway's Mississippi 1927 Code, the Railroad Commission of the State of Mississippi was authorized to classify railroads for payment of state privilege taxes. A copy of the act is made appendix one hereto.

The company offered to prove that under this act, the Railroad Commission of the State of Mississippi classified the Yazoo & Mississippi Valley Railroad as a first class

railroad, and classified the Columbus & Greenville Railway as a third class railroad. R. 43.

Objection was made by the appellee to the introduction of the testimony, and the same was sustained. R. 42.

The company also offered to prove that the tax commissioners of the State of Mississippi, in assessing railroad property in the State of Mississippi for ad valorem taxes, fixed the valuation of the company's property at one thousand dollars per mile; while that of the Yazoo & Mississippi Valley Railroad Company was assesesd at thirty-two thousand dollars per mile. The admission of this testimony was likewise objected to by the appellee and excluded. Judgment was entered against the company for taxes in accordance with the provisions of the act of 1914 for the full amount sued for; that is to say, a tax of $350.00 per mile, crediting the company with $50.00 per mile paid by it. R. 54.

The Columbus & Greenville Railway Company prosecuted its appeal to the Supreme Court of the State of Mississippi, and by appropriate assignment of error, reasserted the validity of the act of 1926, under the Fourteenth Amendment to the Constitution of the United States, and that said railroad company, appellant, was deprived of its property without due process of law and denied the equal protection of the law by declaring said act of 1926 invalid and enforcing against it Chapter 282 of the Mississippi Laws of 1914. R. 47.

The railway company, in its assignment of error in

the Supreme Court of the State of Mississippi, further took the position that the enforcement against it of the act of the Mississippi legislature of 1914, hereinbefore set out, under the facts and circumstances in this case, would cause said act to violate the Fourteenth Amendment to the Constitution of the United States, in that the same would deprive the railway company of its property without due process of law and deny to it the equal protection of the law.

The judgment of the Circuit Court of Montgomery County, Mississippi, complained of was affirmed. R. 54.

The court delivered the following opinion, reported 127 So. 784:

> "This case is ruled by the opinion rendered on the former appeal herein, (154 Miss. 317, 122 So. 366), to which we adhere, and the evidence excluded, if competent, as to which we express no opinion, could not have changed the results. Affirmed."

Petitioners A. T. Stovall and A. F. Gardner, Sr., became sureties on the appeal bond of the railway company to the Supreme Court of the State of Mississippi from the judgment rendered in the Circuit Court of Montgomery County, Mississippi, and join in this petition by reason thereof.

In addition to filing petition for certiorari in this case, the railway company prosecuted an appeal under Section 344, Judicial Code, U. S. C. A. from the judgment of the Supreme Court of the State of Mississippi in holding valid

and enforcing against it Chapter 282, Miss. Laws of 1914, hereinbefore referred to. R. 58-66.

This Court granted petitioner's application for writ of certiorari, ... U. S....., 75 L. Ed. 79, and passed to the final hearing the question of retaining jurisdiction on appeal.

ARGUMENT.

I.

BRIEF ON APPEAL.

(a) *Facts excluded should be treated as established.*

In the case of *Fairmont Creamery Co. v. Minn.*, 274 U. S. 1, 71 L. Ed. 893, the Court used the following language:

> "The trial court excluded this evidence as immaterial, and the supreme court approved. We may, therefore, treat the facts stated as though established and held to have no bearing on the question of guilt or the validity of the enactment."

(b) *Chapter 282, Miss. Laws of 1914, as construed and enforced in this case, violates the Fourteenth Amendment to the Constitution of the United States.*

We are reversing, for reasons which will become apparent, the order of the presentation of the points relied upon in this case, and therefore present to the Court an argument based upon the theory that Chapter 282, Miss. Laws of 1914, as construed and enforced against the rail-

way Company in this case, violates the Fourteenth Amendment to the Constitution of the United States, in that the same deprives the Railway Company of its property without due process and denies the equal protection of the laws. We are led to take this course because it is perfectly apparent that the legislature of the State of Mississippi in enacting Chapter 239, Miss. Laws of 1926, did so for the purpose of removing the injustice and discrimination created by the enforcement of the act of 1914 against appellant and petitioner.

Taxes levied by the Mississippi Levee District for levee purposes come under the class known as local improvement taxes. This has been held by the Supreme Court of Mississippi in several cases. In *Williams v. Commock*, 27 Miss. 209, it was held that a tax of five cents per acre for the purpose of building levees was a local improvement tax. In *Daily v. Swope*, 47 Miss. 367, the court said that there are two general classes of taxes—(1) general taxes, and (2) taxes for local improvements; that taxes for levee districts are local improvement taxes. In *Vasser v. George*, 47 Miss. 713, it was held that a levee tax is a "local assessment for a local improvement." In *Locke v. Dantzler Lumber Co.*, 119 Miss. 783, 81 So. 175, the question was the constitutionality of an acreage tax on all the land in Stone County for the purpose of building a road. The court sustained the constitutionality of the tax, saying:

> "It is a tax for a local improvement of this road district. It is not a tax for the purpose of raising the general revenue of the county to defray its expenses, but a special tax to defray the improvements made on the roads in this district It may be termed a tax for a local betterment or im-

provement. *It is a tax similar in all respects to the levee tax held constitutional in the case of Daily v. Swope*, 47 *Miss.* 367. In that case, the Court fully discussed the question of taxation for raising revenue generally, and taxation for local betterments or improvements. In the *Daily case* above mentioned, the Court, at great length, held that a tax for the purpose of constructing and maintaining a levee was a local improvement tax or local assessment."

(1) *Since the tax is one for a local improvement, the burden should be imposed in proportion to the benefits to be derived. There should be some reasonable presumption that substantial justice would be done.*

Under the facts disclosed by the record in this case, the benefits possible to be received by the Columbus & Greenville Railway Company are so utterly disproportionate to those had and received by the Yazoo & Mississippi Valley Railroad Company that there is not only no reasonable presumption of substantial justice, but, upon the other hand, the application of the tax of $350.00 per mile to the Columbus & Greenville Railway Company, under the facts and circumstances in this case, is arbitrary, discriminatory and unjust, bearing no relation whatsoever to the comparative benefits to be enjoyed by it.

Upon the other hand, we have the Yazoo & Mississippi Valley Railroad Company, a modern, up to date interstate carrier, forming part of the great Illinois Central System, operating a large number of trains, both passenger and freight, north and south through the entire district, con-

sisting of agricultural lands as productive as the valley of the Nile, exposed to the perils of flood from the Mississippi River, requiring a very substantial road bed, its rails, ties, bridges, shops, depots, buildings, locomotives, engines, trains and cars, the last word in railroad construction. This vast railroad enterprise is one hundred per cent. exposed to the flood waters of the Mississippi River. By the Railroad Commission of the State of Mississippi, its road bed is assessed at $32,000 per mile.

Section 186 of Chapter 118, Miss. Laws of 1926, is in the following language:

> "Sec. 186. Railroads. That section 3856 of Chapter 114 of the Code of 1906, levying privilege taxes on railroads, be and the same is hereby amended so that for the purpose of levying a privilege tax on railroads, such railroads are divided into four classes; 1st, 2nd, 3rd and narrow gauge, and privilege taxes levied on them as follows:
>
> "On each railroad of the first class, per mile, ... $45.00
> "On each railroad of the second class, per mile, ... 25.00
> "On each railroad of the third class, per mile, ... 10.00
> "On each narrow gauge railroad, per mile, ... 2.50
>
> "The Railroad Commission shall, annually, on or before the first Monday in August, classify the several railroads according to their charter and the gross earnings of each, and the privilege taxes thereon shall be paid on or before the first day of December, and the findings of said Railroad Com-

mission shall be certified to the Auditor of Public Accounts and the Chancery Clerk of the County through which each road or roads run; and any person or persons, natural or artificial, who shall exercise any of the privileges taxed herein, without first paying the tax and procuring the tax or license, as required by law, shall be subject to the pains and penalties imposed by Section 3894 of the Code of 1906, and to such other pains and penalties as may be otherwise provided by law."

Acting under this section, the Mississippi State Railroad Commission, in the year 1926, classified the main line of the Yazoo & Mississippi Valley Railroad as a first class railroad.

In the case of *Railroad Co. v. The State*, 70 So. 355, 110 Miss. 290, the Supreme Court of the State of Mississippi held that it was without authority to review the action of the Railroad Commission in classifying railroads; that the question was legislative in nature and not judicial.

The stock of the Yazoo & Mississippi Valley Railroad Company was shown to be unpurchasable. Upon the other hand, we have the Columbus & Greenville Railway Company, petitioner and appellant, a railroad just emerging from a receivership, operating under the most serious handicap, with a railroad assessed at one thousand dollars per mile, classified by the Mississippi State Railroad Commission under the rule announced by the Supreme Court of the State of Mississippi as a third class railroad, running at right angles to and not parallel with the Mississippi River, with only forty per cent. of the levee district lying

north of its terminus, Greenville, thereby greatly lessening its exposure to flood waters of the Mississippi River, its cars, locomotives, engines, equipment and construction being inferior, old and dilapadated, its cars and equipment secondhand, operating, after leaving the levee district, through an unfavorable hill section of the state, being an intrastate railroad; its locomotive engines not exceeding one-fourth the capacity of that of the Yazoo & Mississippi Valley Railroad Company, its capital stock utterly without value. A mere statement of the facts is sufficient to demonstrate the injustice of the act as applied to the petitioner and appellant in this case. The following authorities are directly in point:

In the case of *Gast Realty & Investment Co. v. Schneider Granite Co.*, 240 U. S. 55, 60 L. Ed. 523, this Court held that a municipal ordinance fixing the assessment against private property for the construction of public improvement was void, because the assessment was arbitrary, having no relation to the benefits conferred, using the following language:

> "The City of St. Louis is shown by this case and by others in the Missouri reports to contain tracts not yet cut into city lots, extending back from streets without encounternig a parallel street much farther than the distance within which paving could be supposed to be a benefit. See, for instance, *Gilsonite Roofing & Paving Co. v. St. Louis Fair Asso.*, 231 Mo. 589, 132 S. W. 657; *Granite Bituminous Paving Co. v. Fleming*, 251 Mo. 210, 158 S. W. 4; *Loth v. St. Louis*, 257 Mo. 399, 165 S. W. 1023; *William R. Bush Con-*

struction Co. v. Withnell, 185 Mo. App. 408, 170 S. W. 361. The ordinance, following the charter as construed, established a line determining the proportions in which the tax was to be borne that, after running not a hundred feet from the street, leaped to near five hundred feet when it encountered such a tract, and on the opposite side of the street was one hundred and fifty and two hundred and forty feet away. The differences were not based upon any consideration of difference in the benefits conferred, but were established mechanically in obedience to the criteria that the charter directed to be applied. The defendant's case is not an incidental result of a rule that, as a whole and on the average, may be expected to work well, but of an ordinance that is a farrago of irrational irregularities throughout. It is enough to say that the ordinance following the orders of the charter is bad upon its face as idstributing a local tax in grossly unequal proportions, not because of special considerations applicable to the parcels taxed, but in blind obedience to a rule that requires the result. And it can not be said that the ordinance as a whole may be regarded as an individual exception under a rule that promises justice in all ordinary cases. The charter provisions as applied to a city like St. Louis must be taken to contemplate such ordinances under the construction given to it by the state courts. Judgment reversed."

(2) *A tax on railroad property for a local improvement which is several times greater than that paid by the owner of other property in similar situation is a denial of the equal protection of the law, in violation of the Four-*

teenth Amendment to the Constitution of the United States.

The system of raising revenues for the Mississippi Levee District is provided by Chapter 156, Mississippi Laws of 1896, and the hereinbefore mentioned Chapter 282 of the Mississippi Laws of 1914. These statutes provide for four classes of taxation, as follows:

1. An ad valorem tax on all property, real and personal, in the Mississippi Levee District as assessed on the county assessment rolls at the rate of 5 mills on the dollar.

2. A tax on land at the rate of 5c per acre or fraction thereof.

3. A tax on all lint cotton (i. e. cotton from which the seed has been removed) at the rate of 1-5 cent per pound.

4. A tax on railroads at the rate of $350.00 per mile for main track, $210.00 per mile for branch lines, and $50.00 per mile for railroads having less than twenty-five miles in the Mississippi Levee District.

The evidence shows (record page 40) that the ad valorem tax rate for the year 1926 was four mills and for 1927 five mills. The evidence further shows (record page 70) that the Columbus & Greenville Railway was assessed for the years in question at one thousand dollars per mile and the Yazoo & Mississippi Valley Railroad was assessed at thirty-two thousand dollars per mile. Therefore, if railroads had not been put in a class to themselves, but had been left to be taxed as other property, on the basis of value and acreage, the Columbus & Greenville Railway Company would have been taxed at the rate of four dollars per mile in 1926 and five dollars per mile in 1927 plus the acreage tax on

five cents per mile. The Yazoo & Mississippi Valley Railroad, under the general ad valorem and acreage tax, would have been liable for taxes at the rate of $128.60 per mile in 1926, and $160.60 per mile in 1927.

By reason of the special classification of railroad property created by Chapter 282, Miss. Laws of 1914, taxes are demanded of both of these railroad companies at the arbitrary rate of $350.00 per mile. The statutes are not clear as to whether the arbitrary mileage tax on railroads is in addition to the advalorem and acreage taxes or in lieu thereof; but even if the mileage tax is in lieu of the ad valorem and acreage taxes, the result is that the contribution demanded by the tax collectors of the appellant railroad company is seventy times as great as that demanded of other property owners in the Mississippi Levee District in proportion to value, and thirty-two times as great as that demanded of the other railroad in the district in proportion to value.

Agricultural products are exempt from general taxation in Mississippi, and are not assessed on the county assessment rolls. The cotton tax at the rate of 1-5 cent per pound or $1.00 per bale is the substantial equivalent of ad valorem tax on cotton, a species of property which would not be taxed for levee purposes if it were not for the special cotton tax. It is a matter of common knowledge in the State of Mississippi that the finest land in the state for the purpose of raising agricultural products is that in the Mississippi Levee District. It is also a matter of common knowledge that, without the levees, this district would be subject

to annual overflows, and that cotton will not grow under water.

We repeat, in this connection, the many points of dissimilarity between the Columbus & Greenville Railway Company, petitioner and appellant, and the Yazoo & Mississippi Valley Railroad Company; the one a modern, standard, high grade interstate carrier of incalculable superiority, representing enormous value, exposed to the flood waters of the Mississippi River, equipped with new and modern locomotives, trains and cars, with a road bed of standard, superior construction, classified by the Mississippi State Railroad Commission as a first-class railroad, assessed at thirty-two thousand dollars per mile, against the Columbus & Greenville Railway assessed at one thousand dollars per mile, classified by the same Commission as a third-class railroad, possessed of the most limited railroad facilities, old, second-hand equipment, with inferior construction, and with an infinitely smaller proportionate exposure to the flood waters of the Mississippi River. A mere statement of the foregoing facts is sufficient to establish the arbitrary and discriminatory nature of the tax of $350.00 per mile, as applied to the Columbus & Greenville Railway in this case. The following authorities are directly in point:

The decisions are so numerous that we will only undertake to discuss some of the more outstanding ones. In *K. C. S. Ry. Co. vs. Road Improvement District*, 256 U. S. 658, all property in the district was assessed for benefits in varying zones, but the railroad company was assessed on a mileage basis. The Supreme Court of Arkansas held that the assessment had been honestly made, and that the mileage assess-

ment on the railroad was equivalent to its benefits. This court said:

"The settled general rule is that a state legislature may create taxing districts to meet the expense of local improvements and may fix the basis of taxation without encountering the Fourteenth Amendment, unless its action is palpably arbitrary or a plain abuse. Ordinarily, the levy may be upon lands specially benefited, according to value, position, area or the front foot rule.

"If, however, the statute providing for the tax if of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law can not stand against the complaint of one so taxed.

"The statute under consideration prescribes no definite standard for determining benefits from the proposed improvements * * * obviously the railroad companies have not been treated like individual owners, and we think the discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law. * * * Classification, of course, is permissible, but we can find no adequate reason for what has been attempted in the present case. * * * *Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality.*"

That decision fits the present case like a glove.

In *K. C. S. Ry Co. v. Ogden Levee District*, 15 Fed. (2) 637, (decided October 1926), the United States Circuit Court of Appeals, in discussing the legality of the Arkansas statute raising revenue for the purpose of building levees along the Red River by means of ad valorem taxation only, where the result was that a railroad company was made to pay an unfair proportion of the burden, the court said:

> "The law applicable to the creation of taxing districts and the assesment of property therein to pay for special improvements, such as drainage, roads, levees, etc., is well settled. Time and again the Supreme Court of the United States has laid down the rules of law which pertain to the situation shown to exist in this case."

Then, it proceeds to discuss some of the leading cases and applies the law to the facts in that case, holding that the tax on the railroad in that case was "palpably arbitrary and a plain abuse."

In *Road Improvement District vs. Missouri Pacific R. R. Co.*, 2 Fed. (2), 340, (USCCA, 1924), it was held that a railroad could not be assessed on a mileage basis for a public improvement where other property was assessed on an acreage basis, where the result was that the railroad would have to pay substantially more taxes by reason of such classification. That case was appealed to the Supreme Court of the United States and decided under the name of *Road District vs. Missouri Pacific R. R. Co.*, 274 U. S. 188, (1927), where it was held that although the railroad would receive some benefit from the road, its proportion of the cost was assessed too high where the result was to make the railroad

pay 18.2% of the cost of the road, although its land was only eight-tenths of one per cent. of the total area. This assessment against the railroad was approved by a special bill of the legislature, but the court held that the *determination of benefits by the legislature was no more binding on the courts than when the determination was made by a subordinate body.* *In Road District vs. Missouri Pacific R. R. Co.*, 275 Fed., 600, (U. S. C. C. A.), it was held that an arbitrary assessment against a railroad was void even though made by the legislature.

In *K. C. S. Ry. Co. vs. May*, 2 Fed. (2), 680, (U. S. C. A. 1924), a road district made an assessment of benefits against the railroad company, amounting to $44,000.00 per mile; whereas, lands generally were assessed at $25.00 to $40.00 per acre, whereby the railroad company would have paid twenty-four and one-fourth per cent. of the total cost of the road. The representative of the railroad company had a conference with the commission which assessed benefits, and agreed on an assessment at $10,000.00 per mile, which would have made the railroad pay only six per cent. of the total cost of the improvement. But thereafter the commissioner reduced other assessments so greatly that in the end the railroad was left to pay thirty-one per cent of the total. The railroad company brought suit to enjoin collection of the tax. The road district pleaded that the railroad had agreed on the amount of its assessment. The court held that the assessment made against the railroad must be considered in the light of assessments made against other property owners, and that even though the railroad had agreed to its assessment at a time when the assessment

against other property owners were such that the railroad would pay only six percent. of the total cost, such agreement was not binding when the assessments of other property owners were reduced, as such reduction amounted to a fraud against the railroad.

In *Thomas vs. Kans. City So. Ry. Co.*, 261 U. S. 481, it was held that where a drainage ditch would benefit about twelve hundred acres of land, of which the railroad company owned only forty acres, it was a denial of equal protection of the laws to attempt to pay for the improvement by an ad valorem tax on all property within the district where the result was that the railroad would pay more than half of the cost of the improvement.

Road Improvement Dist. vs. M. P. R. R. Co., 274 U. S. 188, 71 L. ed. 992.

An examination of the cases where railroad property has been put in a special class to itself shows that such classification is only permitted where the resulting tax will be no more than would have been paid under the ordinary method of taxation. For example, in *Great Northern Ry. Co. vs. Minnesota*, 278 U. S. 503,509, which is a very recent case, this court said:

> "We find nothing in the record to indicate that the tax under consideration plus that already collected, exceeds what would be legitimate as ordinary tax on the property valued as part of a going concern, or is relatively higher than the tax on other kinds of property."

In that case, the state levied a tax of three per cent. on the gross income of the railroad, which was sustained because the resulting taxation was no higher than would have been produced by the ordinary method.

In *Pullman Co. vs. Richardson*, 261 U. S. 330, 339, this Court sustained a California statute which levied a tax of four per cent. on the gross receipts of the Pullman Company in that state in lieu of all other taxes, using the following language:

> "A tax measured in this way * * *, which is not in excess of what would be a legitimate tax on such property value as part of a going concern, or relatively higher than taxes on other classes of property, does not discriminate against interstate commerce and is valid."

In *Galveston, etc., Ry. Co. vs. Texas*, 210 U. S. 217, 227, where a tax based on gross revenue was involved, and the lawyers were arguing whether the tax was a privilege tax or a property tax, this Court said:

> "By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property, or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the constitution. It appears that we are to look for a practical rather than a logical or philosophical distinction."

On the other hand, classification which produces inequality in the burden of taxation is held to be a denial of the equal protection of the laws and a violation of the Fourteenth Amendment.

In *Royster Guano Co. vs. Virginia*, 253 U. S. 412, 64 L. ed. 989, a state tax was held in violation of the equal protection clause of the Fourteenth Amendment. The Court said:

> "It is unnecessary to say that 'equal protection of the laws', required by the Fourteenth Amendment does not prevent the states from resorting to classification for the purposes of taxation. But the classification must be reasonable, not arbitrary, and *must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.* The latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy. (Citing many cases). Nevertheless, a discriminatory tax law can not be sustained against the complaint of a party aggrieved if the classification appears to be altogether illusory."

In the very recent case of *Louisville Gas Co.. vs. Coleman*, 277 U. S. 32, 37, decided April 30, 1928, the Court restated the well-established rule that while the states have power to classify for purposes of taxation, the classification "must be reasonable, not arbitrary, and *must rest upon some ground of difference having a fair and substantial relation to the object of legislation, so that all persons similarly situated shall be treated alike.*" This rule was approved by the Supreme Court of Mississippi in the present case, *Miller vs. Columbus & Greenville Railway Co.*, 122 So. 366, where the court said:

> "The ground of the appellant's contention is that this classification has no reasonable relation

> to the purpose for which the statute was enacted, but is arbitrary and unreasonable, and, therefore, in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution. This is so manifestly correct that the citation of authorities therefor would be supererogatory."

The mere fact that property is owned by a railroad is no reasonable basis of classification and discrimination as far as local improvements are concerned. Railroads may be classified for purposes of more convenient or logical assessment; or they may be classified and taxed by mileage tax, or a gross receipts tax, which is no more than a just equivalent of the ordinary ad valorem tax, but where the disparity between the mileage tax and the ordinary tax becomes gross, there is denial of the equal protection.

What sorts of basis of classification have been held to be reasonable? In *Houck vs. Little River Drainage District*, 239 U. S. 254 60 L. Ed. 267 this Court said: "The state, in its discretion may lay such assessments in proportion to position, frontage, area, market value, or to benefits *estimated by commissioners.*"

In *K. C. So. Ry. Co. vs. Road District*, 256 U. S. 658, 65 L. ed 1151, this Court said:

> "Ordinarily, the levy may be upon land especially benefitted according to value; position, area or the front foot rule."

In *Vasser vs. George*, 47 Miss. 713, the Supreme Court of Mississippi said: "Assessments for local improvements may be made on the basis of value, area, benefits or the front foot rule."

In the case of *Memphis & Charleston Railway Company v. C. L. Pace*, decided on January 5, 1931, the Court used the following langauge:

> "But, however the tax may be laid, if it be palpably arbitrary, and therefore a plain abuse of power, it falls within the condemnation of the due process clause. *Houck v. Little River District*, supra; *Valley Farms Co. v. Westchester*, supra; and if it be manifestly and unreasonably discriminatory it falls within the condemnation of the equal protection clause. *Gast Realty Co. v. Schneider Granite Co.*, 240 U. S. 55; *Kansas City Southern Ry. Co. v. Road Improvement District No. 6*, 256 U. S. 658; *Thomas v. Kansas City Southern Ry Co.*, 261 U. S. 481; *Road Improvement District No. V v. Missouri Pacific R. R. Co.*, 274 U. S. 188."

These several methods of classification have been approved in many cases, although there are exceptions under each of them where the result was shown to be of such obvious and extreme discrimination that it must have been known by those who made the statute. Those who enacted the plan of taxation for the Mississippi Levee District adopted two of the methods approved above, to-wit, area or acre-

age and value. It is obvious that they did not adopt the method of apportioning the tax according to benefits.

In *Smith vs. Willis*, 78 Miss. 243, the Supreme Court of Mississippi expressly stated that taxes in the Mississippi Levee District are not apportioned according to benefits. The Court said: "The doctrine of comparative benefits and graduation of levee tax servitudes does not apply to the Mississippi Levee District."

It has been held that an arbitrary assessment of benefits made by the legislature is just as unconstitutional as one made by a subordinate body. *Road District vs. Missouri Pacific R. R. Co.*, 274 U. S. 188, 71 L. ed. 992.

The special tax against railroads can not be justified on the theory that taxation in the Mississippi Levee District is based on benefits and that railroads receive more benefits than other property. Both the evidence and the law are to the contrary.

The appellee may claim that the appellant is estopped to raise the question of the unconstitutionalty of the mileage tax by the fact that the appellant paid this tax for many years. We say that there is no element of estoppel present. The mere payment of taxes for a number of years without protest does not create an estoppel to contest the constitutionality of the tax for any particular year. In *K. C. S. R. R. Co. vs. Ogden Levee District*, 15 Fed. (2) 637, at page 643, this exact question is discussed, and it was held

that payment of the levee taxes for fourteen years, during which time bonds had been issued by the District, did not create an estoppel against the railroad company. See *Sioux City Bridge Co. vs. Miller*, 12 Fed. (2) 41, 45. Other cases might be cited, but they seem unnecessary.

Furthermore, appellant has not acquiesced in this arbitrary tax of $350.00 per mile. It is some times said in decisions of courts with reference to taxation which is alleged to be unequal, that the complainant ought to have sought relief from the legislature. Well, in this case, the appellant did seek relief from the legislature first, and was successful in obtaining that relief by the amendment of 1926, which reduced the mileage tax so far as this appellant is concerned from $350.00 per mile to $50.00 per mile. The Supreme Court of Mississippi has held that reduction arbitrary and unreasonable, and, therefore, void. If the amendment of 1926 is void for that reason, then, by the same rule, the entire railroad mileage tax is void. If the railroad mileage tax should be held unconstitutional, the result would be that railroad property in the Mississippi Levee District would be liable to taxation under the general plan imposed by the act of 1896, hereinbefore mentioned, with the result that railroads would pay the ad valorem and acreage taxes. Railroads would then be taxed on the same basis as other property in the district, and there could be no claim of discrimination either in favor of or against this class of property. Appellant desires to contribute its fair proportion to the

common fund necessary to protect property within the Mississippi Levee District from the flood waters of the Mississippi River, and is willing to accept taxation on any recognized basis of spreading the burden of such taxation, which places appellant in the same class with other property generally throughout the district, whether it be on the basis of value, area or benefits determined by commissions, but it is unwilling to pay a tax which is both arbitrary and grossly excessive.

The arbitrary nature of the tax imposed upon the Columbus & Greenville Railway Company in this case, and the discrimination thereby created, are illustrated in the following cases: *Southern Ry. Co. vs. Green*, 216 U. S. 400, 54 L. ed. 536; *Royster Guano Co. vs. Virginia*, 253 U. S. 412, 64 L. ed. 989; *Schlesinger vs. Wisconsin*, 270 U. S. 230, 70 L. ed. 557; *Quaker City Cab Co. vs. Pennsylvania*, 277 U. S. 389, 72 L. ed. 927.

(3) *No judicial ascertainment of the legality of the tax.*

The tax imposed by this act is one for a local improvement, the funds to be derived for the purpose of constructing and maintaining levees and discharging obligations of the levee board therefor. Of necessity the obligation of each taxpayer must be based on the proportionate benefits received. In this case, the petitioner and appellant asserts

that the burden imposed upon it is excessive and out of proportion to benefits received, as will appear from the foregoing statement of fact. Under the circumstances, some opportunity should have been afforded the railroad company to determine judicially the validity of the tax and its proportionate part thereof. In other words, notice should have been given with an opportunity to be heard on the question of the distribution of the burden imposed.

In the case of *Bouslog vs. Gulfport*, 112 Miss. 184, 72 So. 896, it is held that where a tax is based on benefits, the statute will be unconstitutional on account of lack of due process, unless the statute itself provides an opportunity for a hearing before the assessment of benefits is made final. The court said that an arbitrary assessment according to benefits could no more be made by the legislature than it could render a judgment against a person without a hearing. This view was re-examined and affirmed in *Sick et al vs. City of Bay St. Louis*, 74 So. 272, 113 Miss. 175.

In the case of *Ohio Valley Water Co. vs. Borough*, 253 U. S. 287, 64 L. ed. 908, it appeared that the municipal authorities of the city had fixed a rate to be charged consumers for water at what was claimed to be an inadequate rate, and the supreme court of the state held that it could not review the adequacy of the rate, since the question of fact was for the determination of the municipal council. This Court held that the municipal authorities acted in a legisaltive capacity, and under an assertion of inadequate rates, the leg-

islature should have provided some judicial tribunal to review the question. The court used the following language:

> "The order here involved prescribed a complete schedule of maximum future rates and was legislative in character. *Prentiss vs. Atlantic Coast Line R. Co.*, 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 345. *Lake Erie & W. R. Co. v. State Public Utility Commission*, 249 U. S. 422, 424, 63 L. ed. 684, 687, P. U. R. 1919D, 459, 39 Sup. Ct. Rep. 345. In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise, the order is void because in conflict with the due process clause, 14th Amendment. *Missouri P. R. Co. vs. Tucker*, 230 U. S. 340, 347, 57 L. ed. 1507, 1509, 33 Sup. Ct. Rep. 961; *Wadley Southern R. Co. vs. Georgia*, 235 U. S. 651, 660, 661, 59 L. ed. 405, 411, P. U. R. 1915A 106, 35 Sup. Ct. Rep. 214; *Missouri vs. Chicago, B. & Q. R. Co.* 241 U. S. 533, 538, 60 L. ed. 1148, 1154, 36 Sup. Ct. Rep. 715; *Oklahoma Operating Co. vs. Love*, 252 U. S. 331, 40 Sup. Ct. Rep. 338. Here, the insistence is that the Public Service Company law, as construed and applied by the supreme court, has deprived plaintiff in error of the right to be so heard; and this is true if the appeal therein specifically provided is the only clearly authorized proceeding where the commission's order may be challenged because confiscatory. Thus far plaintiff in error has not succeeded in obtaining the review for which the 14th Amendment requires the state to provide."

Other cases directly in point are Ex parte Young, 209 U. S. 123, 52 L. ed. 714; *Baker vs. Dreusedow*, 263 U. S. 137, 68 L. ed. 212; *Butters vs. Oakland*, 263 U. S. 162, 68 L. ed. 228.

We respectfully submit that this court should take jurisdiction on appeal; that Chapter 282, Miss. Laws of 1914, as construed and enforced in this case, should be held violative of the Fourteenth Amendment to the Constitution of the United States, as depriving the railway company of due process of law, and denying to it the equal protection of the law. We present this view to the court, because even if this case should be reversed on the writ of certiorari, since the view would be presented to the Supreme Court of the State of Mississippi on reversal that the act of 1926 violated Section 234 of the State Constitution, the question of the constitutionality of the act of 1914 would again be directly involved, and would require, if sustained, an additional appeal to this court.

However, if this court should be of the opinion that the Act of 1914 is invalid for the reason urged it would be unnecessary for the court to decide any other question in the case.

II.

Brief on Constitutionality of Chapter 259, Mississippi Laws of 1926.

(a) *Constitutionality of the Act of 1926 for the determination of this court.*

The appellee in this case, as tax collector, alleged in his declaration that Chapter 259, Mississippi Laws of 1926, violated Section 234 of the Constitution of the State of Mississippi, requiring the publication of acts of the Mississippi legislature affecting the revenue of a levee district. Wherefore, the appellee predicated his right to recover upon Chapter 282, Mississippi Laws of 1914, providing a privilege tax of $350.00 per mile on standard gauge railroads in the district regardless of dissimilarity in conditions affecting the railroads made liable for the tax. The appellee's right of action was predicated, judgment prayed and recovered, under said act of 1914. R. 1-4.

The Supreme Court of the State of Mississippi, which is the final interpreter of its statutes in respect to the meaning thereof, and as to whether or not such statutes conflict with the Constitution of the State, gave due consideration to the contention of appellee and decided that so far as the Constitution of the State of Mississippi was concerned, Chapter 259, Mississippi Laws of 1926, was a valid law, and that such chapter was not invalid by reason of any provision contained in the Constitution of the State of Mississippi. The court then applied the Fourteenth Amendment to the Constitution of the United States and held that Chapter 259, Mississippi Laws of 1926, violated the Fourteenth Amendment to the Constitution of the United States, in that the classification adopted, without regard to dissimilarity in conditions shown, was arbitrary and rested upon no reasonable basis, therefore, offended the Fourteenth Amendment to the Constitution of the United States. As to whether or not Chapter 259, Mississippi Laws of 1926, violates the

Fourteenth Amendment to the Constitution of the United States, involves no question of state law or practice, but requires a construction of the Fourteenth Amendment to the Constitution of the United States, as to which this Court is the final arbiter.

In the case of *Illinois Central R. R. Co. vs. Messina*, 240 U. S. 395, 60 L. ed. 709, the Supreme Court of the State of Mississippi had decided a question involving interstate commerce. Having decided the question erroneously, this Court felt called upon to reverse the decision, using the following language:

> "We are of the opinion therefore that the act was construed wrongly. Assuming, as it has been assumed, that the defendant's liability was governed otherwise by state law, it seems doubtful under the state decisions whether the plaintiff would have been allowed to recover had the court been of opinion that the act of Congress made his presence on the train illegal. *Western Union Tel. Co. vs. McLaurin*, 108 Miss. 273, LRA, 1915C, 487, 66 So. 739. And although there are expressions in the opinion below that raises a doubt, the fact that the supreme court thought it necessary to construe the act indicates that the construction was material to the result. For this reason the judgment must be reversed."

In the case of *Ward vs. Love*, 253 U. S. 17, 64 L. ed. 751, this Court used the following language:

> "The right to the exemption was a Federal right, and was specially set up and claimed as such in the petition. Whether the right was de-

nied, or not given due recognition, by the supreme court, is a question as to which the claimants were entitled to invoke our judgment, and this they have done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-Federal grounds of decision that were without any fair or substantial support."

Other cases directly in point are *Interstate Amusement Co. vs. Albert*, 239 U. S. 560, 60 L. ed. 439; *Truax vs. Corrigan*, 257 U. S. 312, 66 L. ed. 254; *A. & V. Ry. Co. vs. J. & E. Ry. Co.*, 271 U. S. 244, 70 L. ed. 928; *K. C. Structural Steel Co. vs. State of Arkansas*, 269 U. S. 148, 70 L. ed. 204; *Lacoste vs. Department of Conservation*, 263 U. S. 545, 68 L. ed. 437.

(b) *The act will be presumed valid and the classification will be sustained if justified from any state of facts reasonably conceived.*

In determining the constitutionailty of the act of 1926, the petitioner and appellant is entitled to have the facts excluded treated as established. In *Fairmount Creamery Co. vs. Minn.*, 274 U. S. 1, 71 L. ed. 893, this Court said, page 895:

"The trial court excluded this evidence as immaterial, and the supreme court approved. We may, therefore, treat the facts stated as though established and held to have no bearing on the question of guilt or the validity of the enactment."

The following additional authorities are directly in point: *Truax vs. Corrigan*, 257 U. S. 312, 66 L. ed. 254; *Shaffer vs. Carter*, 252 U. S. 37, 64 L. ed. 445; *Wagner vs. Covington*, 251 U. S. 95, 64 L. ed. 157; *Gilligan vs. Covington*, 251 U. S. 104, 64 L. ed. 168; *American Mfg. Co. vs. St. Louis*, 250 U. S. 459, 63 L. ed. 1084.

There is no constitutional objection to an act of a state legislature under the Fourteenth Amendment to the Constitution of the United States because applicable to only one company.

The case of *Fort Smith Light & Traction Co. vs. Board of Improvement*, 274 U. S. 387, 71 L. ed. 1112, involved an act imposing upon a street railway company obligation to pave at its own cost certain streets. The act was general in its nature, but applicable to only one company. On objection thereto as violating the Fourteenth Amendment to the Constitution of the United States, this court used the following language:

> "If a state may delegate to a municipality power to require paving by a street railway located within its limits, (*Durham Pub. Ser. Co. vs. Durham, supra*), we perceive no reason why it may not, by a legislative act, make a like requirement limited to a single municipality."

This is in accord with the decisions of the Supreme Court of the State of Mississippi construing its own statutes. In the case of *Memphis & C. Ry. Co. vs. Bullen*, 121 So. 826, 154 Miss. 536, the court used the following language:

"Where a law is broad enough to reach every portion of the state and to embrace within its provisions every person and thing distinguished by marked characteristics of sufficient importance to make them clearly a class by themselves, is not a local or special law, but a general law, 'even though there be but one member of the class or one place on which it operates'. 25 R. C. L., Sec. 66, p. 815, at page 818l In the case of *Toombs v. Sharkey*, 140 Miss. 676, 106 So. 273, at page 275, the language above quoted from 25 R. C. L., Sec. 66, page 818, is quoted with approval."

In the case of *Thos. M. Wampler v. Lecompte*, ... U. S. ....., 75 L. Ed. 121, advance sheets, this Court used the following language:

"Nor is the equality clause violated by the special provisions that in certain inland waters, blinds need not be placed farther apart than 250 yards. The state court, relying upon *Lindsay v. Natural Carbonic Cas Co.*, 220 U. S. 61, 78, 55 L. Ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160, said: 'Why these provisions were inserted in the statute we are not informed, but we may assume, until the contrary is shown, that a state of facts in respect thereto existed, which warranted the legislature in so legislating.' ..... Md. ....., 150 Atl. 458. This long settled rule disposes also of the alleged discrimination created by the special exemptions applicable to certain other waters of the state."

In the case of *Fort Smith Light & Traction Co. v. Board of Improvement*, 274 U. S. 387, 71 L. Ed. 1112, this Court said:

"We may not assume, in the absence of proof, that such differences do not exist. *Erb v. Morasch*, 177 U. S. 584, 44 L. Ed. 897, 20 Sup. Ct. Rep. 819; *Middleton v. Tex. P. & L. Co.* 248 U. S. 152, 63 L. Ed. 527, 39 Sup. Ct. Rep. 227; *Swiss Oil Corp. v. Shanks*, 273 U. S. 407, 47 Sup. Ct. Rep. 393.

"There are no facts disclosed by the record which would enable us to say that the legislative action with which we are herein concerned was necessarily arbitrary or unreasonable, or justify us in overruling the judgment of the state court that it was reasonable. *Durham Pub. Ser. Co. v. Durham, supra*, 67 L. Ed. 585, 43 Sup. Ct. Rep. 290. Judgment affirmed."

In the case of *Whitney v. California*, 274 U. S. 357, 71 L. Ed. 1095, this Court said:

"One who assails the classification must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Lindsley v. Natural Carbonic Gas* Co., 220 U. S. 62, 78, 55 L. Ed. 370, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160, and cases cited."

In the case of *Weaver v. Palmer*, 270 U. S. 402, 70 L. Ed. 654, this Court used the following language:

"Legislative determination, express or implied, are entitled to great weight; but it is always open to interested parties to show that the legislature has trangressed the limits of its power. *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 413, 67 L. Ed. 322, 325, 28 A. L. R. 1321, 43 Sup. Ct. Rep. 158. Invalidity may be shown by things

which will be judicially noticed. *Quong Wing v. Kirkendall*, 223 U. S. 59, 64, 56 L. Ed. 350, 352, 32 Sup. Ct. Rep. 192, or by facts established by evidence. The burden is on the attacking party to establish the invalidating facts. See *Minnesota Rate Cases, Simpson v. Shepard*, 230 U. S. 352, 57 L. Ed. 1511, 1563, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18."

In the case of *Dominion Hotel v. State of Arizona*, 249 U. S. 265, 63 L. Ed. 597, this Court said:

"The only question is whether we can say on our judicial knowledge that the legislature of Arizona could not have had any reasonable ground for believing that there were such public considerations for the distinction made by the present law. The deference due to the judgment of the legislature on the matter has been emphasized again and again. *Hebe Co. v. Shaw*, 248 U. S. 297, 303, ante 255, 258, 39 Sup. Ct. Rep. 125. Of course, this is especially true when local conditions may affect the answer,—conditions that the legislature does, but that we can not, know. *Thomas Cusack Co. v. Chicago*, 242 U. S. 526, 50, 531, 61 L. Ed. 472, 475, 476, L. R. A. 1918A, 136, 37 Sup. Ct. Rep. 190, Ann. Cases, 1917C, 594."

In the case of *Middleton v. Railroad Co.*, 249 U. S. 152, 63 L. Ed. 527, this Court said:

"The burden being upon him who attacks a law for unconstitutionality, the courts need not be ingenious in searching for grounds of distinction to sustain a classification that may be subjected to criticism."

In the case of *Rast, Tax Collector, v. Vandeman*, 240 U. S. 342, 60 L. Ed. 679, this Court held that if any state of facts could be conceived that would sustain the law, the existence of such facts must be assumed, using the following language:

> "It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it; and the existence of that state of facts at the time the law was enacted must be assumed. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78, 55 L. Ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion or serious strength. It is not within the competency of the courts to arbitrate in such contrariety. *C. B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. Ed. 328, 31 Sup. Ct. Rep. 259; *German Alliance Ins Co. v. Lewis*, 233 U. S. 389, 413, 414, 59 L. Ed. 1011, 1022, 1023; L. R. A. 1915C, 1189, 34 Sup. Ct. Rep. 612; *Price v. Illinois*, 238 U. S. 446, 452, 59 L. Ed. 1400, 1405, 35 Sup. Ct. Rep. 892."

As preliminary to the authorities which we shall cite upon the question of classification, we direct the attention of the Court to the rule that classification need not depend upon scientific accuracy. *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. Ed. 552.

Nor is the Court, in determining the question, concerned with questions of lack of wisdom, crudeness, implicity, or even injustice in the state law. *Heath, etc., Mfg. Co. v. Worst*, 207 U. S. 338, 52 L. Ed. 236.

The Supreme Court of the State of Mississippi has frequently, in order to sustain the constitutionality of acts of the Mississippi legislature imposing taxes, given expression to the well established principle that the legislature has wide latitude in matters of classification, especially for taxation. In the case of *State, ex rel. Knox, Attorney General, v. Gulf, M. & N. R. R. Co.*, 104 So. 689, 138 Miss. 70, wherein the court had under consideration the constitutionality of a graduated income tax, in disposing of objections as to arbitrary classification, the court used the following language:

> "Assuming that the equality clause of section 112 of the State Constitution applies to taxes for general purposes other than to such as ad valorem, it is well settled that the legislature may make a reasonable classification of the subjects of taxation, and, if all of the same class are taxed alike, equality clauses of both the state and federal constitutions are complied with. *Holberg v. Town of Macon*, 55 Miss. 112; *Vicksburg Bank v. Worrell, Tax Collector*, 67 Miss. 47, 7 So. 219; *Clarksdale Ins. Agency v. Cole*, 87 Miss. 637, 40 So. 228; *State v. Lawrence*, 108 Miss. 291, 66 So. 745, Ann. Cas. 1917E, 322; *City of Jackson v. Mississippi Fire Ins. Co.*, 132 Miss. 415, 95 So. 845; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 S. Ct. Rep. 533, 33 L. Ed. 892; 4 *Cooley on Taxation* (4th ed.) 704-717. See, also, authority cited under the next subdivision hereof.
>
> "The reasonableness of such a classification is in the first instance for the determination of the legislature, and the requirement therefor does not mean that the classification must be reasonable

'according to the judgment of reviewing judges, but that the court must be able to see that the legislators could regard it as reasonable and proper without doing violence to common sense.' *People v. Mensching*, 187 N. Y. 8, 79 N. E. 884, 10 L. R. A. (N. S.) 625, 10 Ann. Cas. 101; *City of Jackson v. Mississippi Fire Ins. Co.*, 132 Miss. 415, 95 So. 845. The question for decision then is: Is the classification here made of income reasonable, or can it be so regarded without doing violence to common sense? The argument on which such a classification is based is:"

The court cited with approval *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 42 L. Ed. 1037.

In the case of *State ex rel. Jordan v. Gilmer Grocery Co.*, 125 So. 710, 156 Miss. 99, the court used the following language:

"A classification is valid wherever it proceeds upon any difference which has a reasonable relation to the subject sought to be accomplished, and the difference does not have to be marked but must be palpably arbitrary. The statute may be crude, impolitic, or even unjust, and the classification may be according to general considerations and have reference to prevailing conditions. See *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 19 S. Ct. 609, 43 L. Ed. 909; *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 34 S. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 S. Ct. 281, 43 L. Ed. 552; *Heath v. Worst*, 207 U. S. 338, 28 S. Ct. 114,

52 L. Ed. 236; *Mutual Loan Co. v. Martell*, 222 U. S. 225, 32 S. Ct. 74, 56 L. Ed. 175, Ann. Cas. 1913B, 529."

In the case of *Miller, State Tax Collector, v. Lamar Life Ins. Co. et al.*, 131 So. 282, there was presented to the court the question as to whether or not an act of the legislature of the State of Mississippi exempting from taxation domestic insurance companies, was valid. The court used the following language in sustaining the act:

> "It may have appeared, and probably did appear, to the legislature that the needs of the people of the state required the establishment and development of domestic insurance companies to guarantee to the people insurance on their lives and property. It may have appeared to it that the classification was reasonable and justified on the ground that, by the fostering care, and encouragement and aid thus granted, the establishment and success of domestic companies would be assured, thereby reducing the cost of insurance to the people of the state and causing vast sums of money which had theretofore been sent out of the state in payment of premiums for insurance to be retained therein for investment, and for utilization in the development of the resources of the state. Other reasons for the exemption might be imagined and assigned, and we are unable to say that the classification is wholly unreasonable and arbitrary, and therefore repugnant to the Fourteenth Amendment to the Federal Constitution."

(c) *The legislature of a state has a broader power of classification in matters of taxation than in other classes*

of legislation. It is only necessary that such classification be not arbitrary and rest on some reasonable basis.

The question as to whether or not the classification of railroads for taxation in the levee district is consistent with the Fourteenth Amendment to the Constitution of the United States necessarily depends for its determination upon the situation which presents itself to the state legislature at the time of the passage of the act.

At the 1926 session of the legislature of the State of Mississippi, it was doubtless of the opinion that Chapter 282 of the Mississippi Laws of 1914, taxing standard gauge railroads in the Mississippi Levee District, was unfair and discriminatory. This record discloses that it was confronted with the following facts:

(a) That there were but two standard gauge railroads in the district; one, the Yazoo & Mississippi Valley Railroad, aligned with the Illinois Central System, owning and operating north and south through the entire district, a modern, up-to-date railroad system, the construction of which was superior, its houses, buildings, shops, &c., modern and new; its locomotive engines, cars, &c., first-class, new and of the most effifcient operating capacity. In other words, that it was a first-class, up-to-date railroad, with modern equipment, operating under the most advantageous circumstances, having exposed to the flood waters of the Mississippi River enormous values. In the second place, that the only other railroad in the levee district which might be regarded as a standard gauge railroad from any standpoint, the Columbus & Greenville Railway, was the anti-

thesis of the Yazoo & Mississippi Valley Railroad. It had just emerged from receivership, operated east and west at right angles from the river; its road bed of inferior construction; its equipment old, dilapidated, out of date; its operating capacity inferior and the proportionate volume exposed to the flood waters of the Mississippi River infinitely less than that of the Yazoo & Mississippi Valley Railroad. R. 16-34.

(b) Again, the legislature was confronted with the fact that the Railroad Commission of the State of Mississippi, a body established by it for classifying railroads in Mississippi for purposes of taxation, the judgment of which was held by the Supreme Court of the State of Mississippi to be conclusive on it, 110 Miss. 290, had classified the petitioner railway company as a third-class railroad and the Yazoo & Mississippi Valley Railroad as a first-class railroad.

(c) Again, the Mississippi State Legislature was confronted with the fact that the Mississippi State Tax Commission, whose duty it was to assess for ad valorem taxes railroad property in the State of Mississippi, assessed the railroad of the petitioner at one thousand dollars per mile, while that of the Yazoo & Mississippi Valley Railroad Company was assessed at thirty-two thousand dollars per mile. R. 43, R. 70.

The petitioner in the trial court proved, or offered to prove, the foregoing facts, which were undisputed, in that the appellee neither introduced nor offered to introduce proof of any kind to the contrary, and the Supreme Court

of the State of Mississippi held that even if the facts sought to be proved were all true, such proof was irrelevent, immaterial and incompetent. Therefore, we are entitled to assume that the legislature of the State of Mississippi was necessarily of the opinion that the act of 1914 not only was not calculated to produce justice, but was absolutely arbitrary and discriminatory in its operation. In order to correct this injustice and to provide for a more just and equitable method of taxing railroads in the district, so that each standard gauge railroad would contribute to the construction and maintenance of levees within the district upon some reasonably fair basis, the act of 1926 under review was passed. We respectfully submit that the situation presented, from the undisputed facts, not only justified but required that the Columbus & Greenville Railway Company be placed in a different classification from that of the Yazoo & Mississippi Valley Railroad Company; and it is not only true that a statute, such as the act of 1926, providing for a different classification of the petitioner from that of the Yazoo & Mississippi Valley Railroad Company is consistent with the Fourteenth Amendment to the Constitution of the United States, but any act placing them upon an equal basis for the purpose of raising revenue in aid of the local improvements of constructing and maintaining levees in the district would violate the Fourteenth Amendment to the Constitution of the United States. We submit the following authorities as supporting our contention that the classification adopted by the act of 1926 was in perfect harmony with the Fourteenth Amendment to the Constitution of the United States.

In the case of *American Sugar Refining Co. v. State of Louisiana*, 179 U. S. 89, 45 L. Ed. 102, the legislature of the State of Louisiana passed a law classifying the refineries of sugar for the purpose of taxation. Persons who refined sugar produced by them were exempt from taxation. This Court held that the classification was justifiable, using the following language:

> "The power of taxation under this provision was fully considered in *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892, 10 Sup. Ct. Rep. 533, in which it was said not to have been intended to prevent a state from changing its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property altogether; may impose different specific taxes upon different trades or professions; may vary the rate of excise upon various products; may tax real and personal estate in a different manner; may tax visible property only, and not securities; may allow or not allow deductions for indebtedness. 'All such regulations, and those of like character, so long as they proceed within reasonable limits and general use, are within the discretion of the state legislature or the people of the state in framing their constitution.' See, also, *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. Ed. 1025, 10 Sup. Ct. Rep. 593; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. Ed. 746, 19 Sup. Ct. Rep. 419.
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> "In *Pacific Express Co. v. Seibert*, 142 U. S. 339, 35 L. Ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250, a state statute defining an express company to be such as carried on the business of transportation on contracts for hire with

railroad or steamboat companies, did not invidually discriminate against the express companies defined by it, by exempting other companies carrying express matter in vehicles of their own. This case is specially pertinent to the one under consideration. See, also, *Giozza v. Tiernan*, 148 U. S. 657, 37 L. Ed. 599, 13 Sup. Ct. Rep. 721; *Columbus Southern R. Co. v. Wright*, 151 U. S. 470, 38 L. Ed. 238, 14 Sup. Ct. Rep. 396; *Duncan v. Missouri*, 152 U. S. 377, 38 L. Ed. 485, 14 Sup. Ct. Rep. 570; *Western U. Teleg. Co. v. Indiana*, 165 U. S. 304, 41 L. Ed. 725, 17 Sup. Ct. Rep. 345; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. Ed. 683, 17 Sup. Ct. Rep. 305.

"The Constitution of Louisiana classifies the refiners of sugar for the purpose of taxation into those who refine the products of their own plantations, and those who engage in a general refining business, and refine sugars purchased by themselves or put in their hands by others for that purpose, imposing a tax only upon the latter class. To entitle a party to the exemption it must appear (1) that he is a farmer or a planter; (2) that he grinds the cane as well as refines the sugar and molasses; (3) that he refines his own sugar and molasses, meaning thereby the product of his own plantation. Whether he may also refine the sugar of others may be open to question; although by its express terms the act does not apply to planters who granulate syrup for other planters during the rolling season. The discrimination is obviously intended as an encouragement to agriculture, and does not deny to persons and corporations engaged in a general refining business the equal protection of the laws. The judgment of

the Supreme Court of the State of Louisiana is affirmed."

Bromley v. McCaughn, 280 U. S. 124, 74 L. Ed. 226, was a case in which a tax was made by Congress on the transfer by gift of property. The tax was a graduated one. Gifts aggregating fifty thousand dollars to different persons, provided the gift to any one person did not exceed five hundred dollars, were exempt from the tax. This Court held that the classification was valid, using the following language:

> "It is suggested that the schemes of graduation and exemption in the present statute, by which the tax levied upon donors of the same total amounts may be affected by the size of the gifts to individual donees, are so arbitrary and unreasonable as to deprive the taxpayer of property without due process. But similar features of state death taxes have been held not to infringe the Fourteenth Amendment, since they bear such a relation to the subject of the tax as not to 'preclude the assumption that the legislature, in enacting the taxing statute, did not act arbitrarily or without the exercise of judgment or discretion which rightfully belong to it'. *Stebbins v. Riley*, supra, 268 U. S. 145, 69 L. Ed. 889, 44 A. L. R. 1454, 45 Sup. Ct. Rep. 424. No more can they be a basis for holding that the graduation and exemption features of the present statute violate the Fifth Amendment. The answer to both questions is, no."

In the case of *Carley & Hamilton v. Snook*, 281 U. S. 66, 74 L. Ed. 704, a license tax for the registration of motor

vehicles upon a graduated basis, and which exempted from the operation of the act vehicles weighing less than three thousand pounds, was held by this Court not violative of the Fourteenth Amendment to the Constitution of the United States, using the following language:

> "Only a word need be said of appellants' contention that the exemption of all vehicles weighing less than three thousand pounds, although their loaded weight may be much more than vehicles not exempt, infringes the equal protection clause of the Fourteenth Amendment and the similar Section 21 of Article 1 of the State Constitution. That the legislature may graduate the fees according to the propensities of the vehicles to injure or to destroy the public highways, and may exempt those with respect to which this tendency is slight or nonexistent, can not be doubted. We may not assume that vehicles weighing less than three thousand pounds, with loads which they usually carry, are not of this class, or that vehicles weighing more than three thousand pounds with their accustomed burden added do not have this tendency. It is for the legislature to draw the line between the two classes. *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 300, 301, 42 L. Ed. 1037, 1045, 18 Sup. Ct. Rep. 594; *Clark v. Titusville*, 184, U. S. 329, 331, 46 L. Ed. 569, 572, 22 Sup. Ct. Rep. 382; *Quong Wing v. Kirkendall*, 223 U. S. 59, 62, 56 L. Ed. 350, 351, 32 Sup. Ct. Rep. 192; *Citizens' Teleg. Co. v. Fuller*, 229 U. S. 322, 57 L. Ed. 1206, 33 Sup. Ct. Rep. 833; *Watson v. State Comptroller*, 254 U. S. 122, 125, 65 L. Ed. 170, 175, 41 Sup. Ct. Rep. 43; *Franchise Motore Freight Ass'n v. Seavey*, 196 Cal. 77, 81, 235 Pac.

1000; *Re Smolke*, 199 Cal. 42, 48, 248 Pac. 244. *Cf. Fifth Ave. Coach Co. v. New York*, 221 U. S. 467, 484; 55 L. ed. 815, 820, 31 Sup. Ct. Rep. 709; *Packard v. Banton*, supra; *Silver v. Silver*, 280 U. S. 117, 123, ante, 221, 65 A. L. R. 939, 50 Sup. Ct. Rep 57."

In the case of *Ohio Oil Co. v. Conway*, 281 U. S. 146, 74 L. Ed. 775, there was involved a graduated severance tax upon the production of petroleum, graduated according to the gravity of the oil. This Court held that act valid, using the following language:

> "The states, in the exercise of their taxing power, as with respect to the exertion of other powers, are subject to the requirements of the due process and the equal protection clauses of the Fourteenth Amendment, but that Amendment imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation. The state may tax real and personal property in a different manner. It may grant exemptions. The state is not limited to ad valorem taxation. It may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products. In levying such taxes, the state is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. To hold otherwise would be to subject the essential taxing power of the state to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure. *Bell's Gap R. Co. v. Pennsylvania*, 134 U.

S. 232, 237, 33 L. Ed. 892, 895, 10 Sup. Ct. Rep. 533; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 293, 42 L. Ed. 1037, 1042, 18 Sup. Ct. Rep. 594; *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 121, 54 L. Ed. 688, 692, 30 Sup. Ct. Rep. 496; *Brown-Forman Co. v. Kentucky*, 217 U. S. 563, 573, 54 L. Ed. 883, 887, 30 Sup. Ct. Rep. 578; *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U. S. 350, 353, 62 L. Ed. 1154, 1156, 38 Sup. Ct. Rep. 495; *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 67 L. Ed. 237, 43 Sup. Ct. Rep. 83; *Oliver Iron Min. Co. v. Lord*, 262 U. S. 172, 179, 67 L. Ed. 929, 936, 43 Sup. Ct. Rep. 526; *Stebbins v. Riley*, 268 U. S. 137, 142, 69 L. Ed. 884, 888, 44 A. L. R. 1454, 45 Sup. Ct. Rep. 424."

Again, the Court used the following language:

"There are, it is true, various gravity schedules of prices, and the same fields may produce oils of different gravities, and oils broadly of the same sort may be sold at flat prices, but, if the state was at liberty to adopt a gravity scale for oils which in such large measure were sold on this basis, the state was not required to grade its tax with a nicety which would assign to every oil produced a grade absolutely corresponding to its actual values. That would mean that the state would tax only on a strictly ad valorem basis, a contention wholly inadmissible. In graduating a tax, admittedly within its power to levy, the state had a lagre discretion, and there appears to be no ground for holding that there was such an abuse in this instance as to create constitutional invalidity. *Clark v. Titusville*, 184 U. S. 329, 331, 46 L. Ed. 569, 572, 22 Sup. Ct. Rep. 382. The graduation of the tax on these oils corresponded gener-

ally to the supposed increase of gasoline content, and all oils of the same gravity were treated alike."

Again, the Court used the following language:

"The state might have concluded not to tax the former at all, and in that case, there would have been no constitutional ground of complaint because a tax was laid on the different oils of the Haynesville, Cotton Valley and Pine Islands fields. In *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 67 L. Ed. 237, 43 Sup. Ct. Rep. 83, complaint was made of a statute of Pennsylvania because it levied a tax on anthracite coal and not on bituminous coal. The contention was founded on the fact that both were fuels and that anthracite coal in steam sizes competed with bituminous coal and certain subgrades of the latter competed with certain subgrades of anthracite. The court, accepting the fact of competition, nevertheless sustained the tax, holding that the differences between the two sorts of coal justified the classification."

So, in this case, the legislature might have exempted from taxation small railroads operating a very limited mileage in the district without violating the Federal Constitution. That being true, it would certainly have the right, in the interest of uniformity and equality, to levy a smaller mileage privilege tax upon a railroad of inferior construction and low value. And this is especially true in a case like the present one where the tax is for a local improvement.

In the case of *Southwestern Oil Co. v. State of Texas*, 217 U. S. 114, 54 L. Ed. 688, this Court held that the imposition of an occupation tax on wholesale dealers in oil did

not violate the Fourteenth Amendment to the Constitution of the United States because a similar tax was not required from other wholesale dealers.

Heisler v. Thomas Colliery Co., 260 U. S. 245, 67 L. Ed. 237, involved a case where a tax was imposed on owners of anthracite coal with no similar tax imposed upon owners of bituminous coal. The Court held that there was sufficient distinction between anthracite and bituminous coal to justify the classification, using the following language:

> "The principle of that case, and its concession to the power of a state, have received expression and illustration in cases which concerned the exercise of the power in the classification of objects for taxing purposes. In *Watson v. State Comptroller*, 254 U. S. 122, 65 L. Ed. 170, 41 Sup. Ct. Rep. 43, it is said: 'Any Classification is permissible which has a reasonable relation to some permitted end of governmental action. • • • It is enough, for instance, if the Classification is reasonably founded in "the purposes and policy of taxation'." In other cases, it is said that facts which can be reasonably conceived of as having existed when the law was enacted will be assumed to justify it. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78, 55 L. Ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; *Crescent Oil Co. v. Mississippi*, 257 U. S. 129, 137, 66 L. Ed. 166, 42 Sup. Ct. Rep. 42. And it makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety'. *Rast v. Van Deman & L. Co.*, 240 U. S. 342, 357,

60 L. ed. 679, 687, L. R. A. 1917A, 421, 36 Sup. Ct. Rep. 370, and cases there cited. And, further, the purpose of the legislation may not be the correction of some definite evil, but may be only to remove 'obstacles to a greater public welfare.' See, also, as to classification by legislation and its consonance to the requirements of the Fourteenth Amendment, *District of Columbia v. Brooke*, 214 U. S. 138, 150, 53 L. Ed. 941, 945, 29 Sup. Ct. Rep. 560."

In the case of *Quong Wing v. Kirkendall*, 223 U. S. 59, 56 L. Ed. 350, this Court held that an act exempting from a license tax a laundry where not more than two women were employed was consistent with the Fourteenth Amendment to the Constitution of the United States, using the following language:

"It may make discriminations, if founded on distinctions that we can not pronounce unreasonable and purely arbitrary, as was illustrated in *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 92, 95, 45 L. Ed. 102, 103, 105, 21 Sup. Ct. Rep. 43; *Williams v. Fears*, 179 U. S. 270, 276, 45 L. Ed. 186, 189, 21 Sup. Ct. Rep. 128; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 469, 45 L. Ed. 619, 627, 21 Sup. Ct. Rep. 423."

In the case of *Silver v. Silver*, 280 U. S. 117, 74 L. Ed. 221, it is held that a state statute releasing owners of motor vehicles from responsibility for injury to guests in case of accident occasioned by ordinary negligence does not, in discriminating between gratuitous passengers in automobiles and those in other classes of vehicles, deny the equal pro-

tection of the laws. The Court used the following language:

> "It is said that the vice in the statute is not that it distinguishes between passengers who pay and those who do not, but between gratuitous passengers in automobiles and those in other classes of vehicles. But it is not so evident that no grounds exist for the distinction that we can say a priori that the classification is one forbidden as without basis, and arbitrary. See *Ohio ex rel. Clarke vs. Deckebach*, 274 U. S. 392, 397, 71 L. Ed. 1115, 1120, 47 Sup. Ct. Rep. 630."

In the case of *Stebbins vs. Riley*, 268 U. S. 137, 69 L. Ed. 884, this Court upheld the validity of a statute fixing inheritance tax which refused to permit deduction of amount paid the Federal Government for inheritance tax as applied to residuary legatees.

In the case of *Iron Mountain R. R. Co. v. Arkansas*, 240 U. S. 518, 60 L. Ed. 776, there was presented to the court for review an act of the State of Arkansas, which forbade a railroad company from conducting switching operations across public highways in cities of first and second class, with a switching crew of less than one engineer, a fireman, a foreman and three helpers. The act exempted therefrom railroads less than one hundred miles in length. The court held the classification was reasonable, using the following language:

> "The other grounds are in effect disposed of by prior decisions.

"In the case of *Chicago, R. I. & P. Co. v. Arkansas*, 219 U. S. 453, 55 L. Ed. 290, 31 Sup. Ct. Rep. 275, a statute of Arkansas was considered which required freight trains to be equipped with crews consisting of an engineer, a foreman, a conductor and three brakemen 'regardless of any modern equipment or automatic couplings and air brakes'. The statute did not apply to railroads whose line or lines did not exceed fifty miles in length, nor to any railroad, regardless of length of its line, where the freight train should consist of less than twenty-five cars. The statute was sustained on the authority of prior cases against charges of conflict with the Fourteenth Amendment and the Commerce Clause of the Constitution. We need not cite the cases relied on or repeat the argument of the court. In that case, as in this, there was controversy in the testimony and the contentions of the parties as to the necessity of the statute. It was held, however, that the controversy did not establish that the statute was an arbitrary exercise of power. *Armour & Co. v. North Dakota*, 240 U. S. 510, ante, 771, 36 Sup. Ct. Rep. 440."

The validity of the graduated Federal income tax was affirmed by this Court in *Tyee Realty Co. v. Anderson*, 240 U. S. 115, 60 L. Ed. 554; *Brushaber v. Union Pac. R. R. Co.*, 240 U. S. 1, 60 L. Ed. 493

In the case of *Wilson v New*, 243 U. S. 323, 61 L. Ed. 755, Congress passed an act establishing a permanent eight hour standard for a day's work for employees engaged in the operation of trains upon interstate railway carriers, and

providing for a temporary wage regulation. The act exempted railways independently owned and not exceeding one hundred miles in length, electric street railways and electric interurban railways, from the operation of the act. The Court said:

> "The want of equality is based upon two considerations. The one is the exemption of certain short line and electric railroads. We dismiss it because it has been adversely disposed of by many previous decisions."

In the case of *Citizens Teleg. Co. v. Fuller*, 229 U. S. 322, 57 L. Ed. 1206, the legislature of the State of Michigan imposed a tax on telephone companies, but exempted those whose gross receipts did not exceed $500.00 per annum. The Court held that the classification was proper, using the following language:

> "It may therefore be said that in taxation there is a broader power of classification than in some other exercises of legislation. There is certainly as great a power, and the rule appellant urges can not be adopted. It is inconsistent with the principle of classification and the cases which have explained the principle and the range of its legal exercise.
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> In *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892, 10 Sup. Ct. Rep. 533, it was decided that under the power of classification there might be exemption of property, dependent upon its species, and the rates of excise might be varied upon different trades and products. And it was said that it was safe to

say 'that the Fourteenth Amendment was not intended to compel the state to adopt an iron rule of taxation'. It was pointed out that to give it that effect would destroy the constitutional provision and laws of some of the states which, while enjoining uniformity of taxation, permitted exceptions which were deemed material and that 'it would render nugatory those discriminations which the best interests of society require, which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice, and which every state, in one form or another, deems it expedient to adopt'."

In the case of *C. & O. Ry. Co. v. Conley, Atty. Gen'l*, 230 U. S. 513, 57 L. Ed. 1597, there was presented for review a statute of the State of West Virginia regulating the fare to be charged by carriers for passengers. The act did not embrace railroads of less than fifty miles in length. This Court held that the classification was reasonable, using the following language:

> "Whether the classification shall be according to the amount of passengers and freight carried or of gross or net earnings during a previous year or according to the simpler and more constant test of the length of the line of the railroad is a matter within the discretion of the legislature. If the same rule is applied to all railroads of the same class, there is no violation of the constitution provisions securing to all the equal protection of the laws."

In the case of *New York & New Haven R. R. Co. v. New York*, 165 U. S. 628, 41 L. Ed. 853, there was presented

to the court for review a New York statute prohibiting a railroad company operating in the state to use stoves or furnaces inside of or suspended from passenger cars. The act excluded from the operation thereof railroads less than fifty miles in length. This Court justified the classification, using the following language:

> "In any event, there is no such discrimination against companies having more than fifty miles of road as to justify the contention that there has been a denial to the companies named in the act of the equal protection of the laws. The statute is uniform in its operation upon all railroad companies doing busniess in the state, of the class to which it is made applicable."

In the case of *Erb, Receiver, v. Morasch*, 177 U. S. 584, 44 L. Ed. 897, Kansas City, Missouri, passed an ordinance regulating the speed of railroad trains in the municipality. The ordinance excluded from the operation thereof a transit railway company operated by a steam dummy engine. This Court justified the classification and held the act valid.

In the case of *Clarke v. Titusville*, 184 U. S. 329, 46 L. Ed. 569, this Court had under review an ordinance of a municipality in a city in Pennsylvania, imposing a license tax upon persons carrying on certain occupations in the city. Persons in different occupations paid different amounts, and persons in the same occupation were classified by maximum and minimum sales. The Court justified the classification, using the following language:

> "Manifestly, there was inequality between the members of different classes, and that was con-

ceded in the opinion, but as manifestly there was equality between the members of each class, and that equality was held to satisfy the Fourteenth Amendment to the Constitution of the United States; and the reasoning by which that conclusion was supported is applicable to the case at bar. We met the contention accurately and squarely that there was no reasonable distinction between the classes."

In the case of *Magoun v. Ill. Trust & Savings Bank*, 170 U. S. 283, 42 L. Ed. 1037, this Court held that an act of the State of Illinois classifying taxes for inheritance tax on difference between lineal and collateral relationship to the decedent was based upon substantial distinction and not arbitrary. The Court also held that granting statutory exemptions to estates of certain sizes and amounts was a proper classification, and that the act did not violate the Fourteenth Amendment to the Constitution of the United States.

In the case of *Watson v. Comptroller of the State*, 254 U. S. 122, 65 L. Ed. 170, this Court held that an inheritance tax law which imposed an additional tax of 5% upon certain investments held by the decedent, which investments were not subject to general property taxation, was based upon proper classification. This Court said that it was not necessary that the basis for classification be deducible from the nature of the things classified.

In the case of *Chicago, R. I. R. Co. v. Ark.*, 219 U. S. 453, 55 L. Ed. 290, the State of Arkansas passed an act requiring a minimum of three brakemen for a freight train,

but excluded from the operation of the act railroads less than fifty miles in length.

In the case of *Dow v. Beidelman*, 125 U. S. 680, 31 L. Ed. 841, the legislature of Arkansas passed a statute fixing the rates to be charged by railroad companies, dividing the companies into classes on a mileage basis. This Court held that there was no more reasonable, proper or consistent method of classifying a railroad than that of a mileage basis, using the following language:

> "Whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings, during a previous year, or according to the simpler and more constant test of the length of the line of the railroad is a matter within the discretion of the legislature. If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provisions securing to all the equal protection of the laws."

(d) *Mileage Classification of Railroads has an Historical Background.*

When we turn to state decisions, we find that classification of railroads upon a mileage basis also has some historical background. In the case of *Eureka Pipe Line Co. v. Halliman*, (W. Va.), 105 S. E. 506, the legislature of West Virginia passed an act imposing an occupation tax on pipe lines for transporting oil and gas. According to the classification, the lines were divided into those under and equaling ten miles. The lines under ten miles were exempt from taxation, the court using the following language:

"It is uniformly held that notwithstanding, by the Constitution of a state, taxes must be levied by equal and uniform laws, and that the equal protection of the laws is guaranteed by the Fourteenth Amendment of the Federal Constitution, a state, in the exercise of its taxing power, may classify the subjects of taxation within its limits, and so long as the classifications thus made have a reasonable basis for their existence, the tax imposed upon each member of each class is uniform, the same does not violate such constitutional limitations, 'c ting cases'. And, as declared by the Supreme Court of the United States in *Citizens Telephone Co. v. Fuller*, supra, the power to classify for the purpose of taxation is broader than such power of classification when exercised for other legislative purposes."

The case was reversed by this Court in *Eureka Pipe Line Co. v. Hallinan*, 257 U. S. 265, 66 L. Ed. 227, on entirely other grounds.

In the case of *Consumers' League v. Colorado R. Co.*, 125 Pac. 577, 53 Colo. 54, the Supreme Court of Colorado upheld an act of the State of Colorado regulating rates of carriers, which exempted from its operation railroads not exceeding twenty-five miles in length. The editor's note to the case indicates the prevalence of such legislation.

In the case of *Railway Co. v. Ark.*, 174 S. W. 223, the Supreme Court of Arkansas held an act valid providing for a full crew, which excluded small railroads therefrom.

The same legislation finds its place in the statutes of Mississippi. Sections 7906-7908, Hemingway's 1927 Code, requiring railroads to equip engines with headlights, exempting from the operation of the act small railroads; Sections 9278-9281 of the same Code prohibiting engines from backing in the night exempting from the operation thereof carriers engaged in hauling lumber; Sections 9284-9286, Hemingway's 1927 Code, known as the full crew law, exempting from the operation thereof railroads not more than fifty miles in length. These statutes are set out in the appendix.

As a matter of fact there will not be found in this country any case, state or federal, invalidating a statute classifying railroads upon a mileage basis. Upon the other hand, as said by this Court in *Dow vs. Beidelman*, supra, 125 U. S. 680, 31 L. ed. 841, a classification according to a mileage basis is the simplest and most constant; therefore, the most satisfactory.

Excluding any question of the evidence introduced or offered touching the actual facts in respect to the two railroad companies involved, then, the question must be determined upon the philosophy stated by this Court in *Rast, Tax Collector, vs. Van Deman*, supra, 240 U. S. 342, 60 L. ed. 679:

> "If any state of facts reasonably can be conceived that would sustain it, then, the existence of that state of facts at the time the law was enacted must be assumed."

It is not necessary, however, in this case that we plant ourselves upon the validity of a mileage classification per se. We are not dependent upon such a classification alone in this case. Upon the other hand, we have the small number of miles plus the many dissimilar facts and circumstances between the petitioner with its short line of railroad in the levee district and the Yazoo & Mississippi Valley Railroad with its vast transportation system to justify the distinction.

As applied to the act of 1926, the Supreme Court of the State of Mississippi held that the classification was invalid under the Fourteenth Amendment to the Constitution of the United States, regardless of the material differences in the situation of the two railroads. However, when it came to the act of 1914, it held that a tax based upon a mileage basis was valid, irrespective of the physical and economical differences shown to exist between the two railroads. As to each act, it held that extrinsic facts were irrelevant and immaterial, condemning the mileage classification in one case, upholding it in the other. The Supreme Court of the State of Mississippi could not be right in each instance, and if it is wrong as to either, this case should be reversed. We respectfully submit, however, that the decision is wrong as applied to both legislative acts under review in this record.

(e) *Appellee, State Tax Collector, in no Position to Present the Federal Question.*

W. J. Miller, State Tax Collector, is not a person within the meaning of the Fourteenth Amendment to the Constitution of the United States. The appellee, in his declara-

tion, at no time complains of any discrimination under the Fourteenth Amendment to the Constitution of the United States in respect to the act of 1926, and we respectfully submit:

(1) That he is in no position to question the validity of the act.

(2) The Fourteenth Amendment to the Constitution of the United States protects personal rights and not official.

See *Smith vs. State of Indiana*, 191 U. S. 138, 48 L. ed. 125; *Caffrey vs. Oklahoma*, 177 U. S. 346, 44 L. ed. 799; *Stewart vs. Kansas*, 239 U. S. 14, 60 L. ed. 120; *Williams vs. Riley*, 280 U. S. 78, 74 L. ed. 175; *Herbring vs. Lee*, 280 U. S. 111, 74 L. ed. 217.

Neither the Yazoo & Mississippi Valley Railroad Company nor any other taxpayer is objecting to the payment of such privilege tax as may be imposed upon it for the construction and maintenance of levees in the district as compared to that imposed upon appellant, plaintiff in error. We submit that the appellee, respondent, W. J. Miller, State Tax Collector, can not be heard to question the validity of the act of 1926. We therefore submit:

(1) That Chapter 282, Mississippi Laws of 1914, violates the Fourteenth Amendment to the Constitution of the United States for the reasons hereinbefore set out.

(2) We submit that Chapter 259, Mississippi Laws of 1926, is consistent with the Fourteenth Amendment to the

Constitution of the United States for the reasons hereinbefore set out.

(3) In any event, we respetcfully ask that the judgment of the Supreme Court of Mississippi appealed from be reversed.

Respectfully submitted,

Wm. H. WATKINS,
A. F. GARDNER, Sr.
R. C. STOVALL,
A. F. GARDNER, Jr.
H. T. ODOM,
Attorneys for Appellant-Petitioners.

APPENDIX ONE

Chapter 118, Miss. Laws, 1926, Sec. 7740, Hemingway's 1927 Code.

7740. Railroads.—186. Section 3856 of Chapter 114 of the Code of 1906, levying privilege taxes on railroads, be and the same is hereby amended so that for the purpose of levying a privilege tax on railroads, such railroads are divided into four classes: 1st, 2nd, 3rd and narrow gauge, and privilege taxes levied on them as follows:

On each railroad of the first class, per mile	$45.00
On each railroad of the second class, per mile	25.00
On each railroad of the third class, per mile	10.00
On each narrow gauge railroad, per mile	2.50

The railroad commission shall, annually, on or before the first Monday in August, classify the several railroads

according to their character and the gross earnings of each, and the privilege taxes thereon shall be paid on or before the first day of December, and the findings of the said railroad commission shall be certified to the auditor of public accounts and the chancery clerk of the county through which each road or roads run; and any person or persons, natural or artificial, who shall exercise any of the privileges taxed herein, without first paying the tax and procuring the tax or license, as required by law, shall be subject to the pains and penalties imposed by Section 3894 of the Code of 1906, and to such other pains and penalties as may be otherwise provided by law. (Laws 1926, Chapter 118. In effect April 30, 1926).

APPENDIX TWO

Sections 7906-7908, 9278-9281, 9284-9286, Hemingway's 1927 Code.

Section 7906. To require railroads to equip engines with headlights in certain cases.—1. All railroad companies, operating or doing business in this state, are hereby required to equip and maintain each and every locomotive used by such companies to run on its main line, between sunset and sunrise, with a good and sufficient headlight, which shall consume not less than three hundred watts at the arc, and with a reflector not less than eighteen inches in diameter, and to keep the same in good condition. The word "main line," used herein, means all portions of the railway line not used as yards, spurs and side tracks. (Laws 1912, Ch. 153. In effect January 1, 1913).

Section 7907. Penalty for violations of this act.—2.

Any railroad company, violating this act in any respect shall be liable to indictment as for a misdemeanor in any county in which the locomotive not so equipped and maintained may run, and on conviction, shall be punished by a fine of not less than twenty-five dollars, nor more than five hundred dollars for each offense. (Laws 1912, Ch. 153. In effect January 1, 1913).

Section 7908. Not to apply to tramroads of logging railroads.—3. Provided this act shall not apply to tramroads, mill roads and roads engaged principally in lumber or logging transportation in connection with mills, nor to railroad systems under thirty miles long not running regular night schedules, nor to any engine, the lighting equipment of which shall have failed during the trip, if it is shown that the equipment was in efficient and effective working condition when the trip was begun, nor to switch engines going to and returning from wrecks, or sent out on the main line to bring into a terminal a train, the engine of which has become disabled. (Laws 1912, Ch. 153. In effect January 1, 1913).

Section 9278. To prohibit backing of engines at night without light and pilot.—1. It shall be unlawful for any person or corporation owning or operating a railroad as a common carrier of passengers and freight for hire in the state, to require or permit a locomotive engine to be backed on his or its line of railroad, in the night time, unless it is provided and equipped with a pilot and headlight on the rear of its tende. (Laws 1908, Ch. 95. In effect March 16, 1908).

Section 9279. Not to apply to logging railroads. Provided, however, that the provisions of this act shall not apply to railroads whose principal business is hauling logs, nor to locomotive engines running for coal or water, doubling hills, returning from trains when broken into, going to or returning from trains in the yard limits of terminal stations, nor to engines engaged in regular switching service in yards or road engines switching at intermediate stations; nor to any locomotive engines in cases of washouts, wrecks, or when going to the assistance of engines so disabled as to block the main track of a railroad. (Laws 1908, Ch. 95. In effect March 16, 1908).

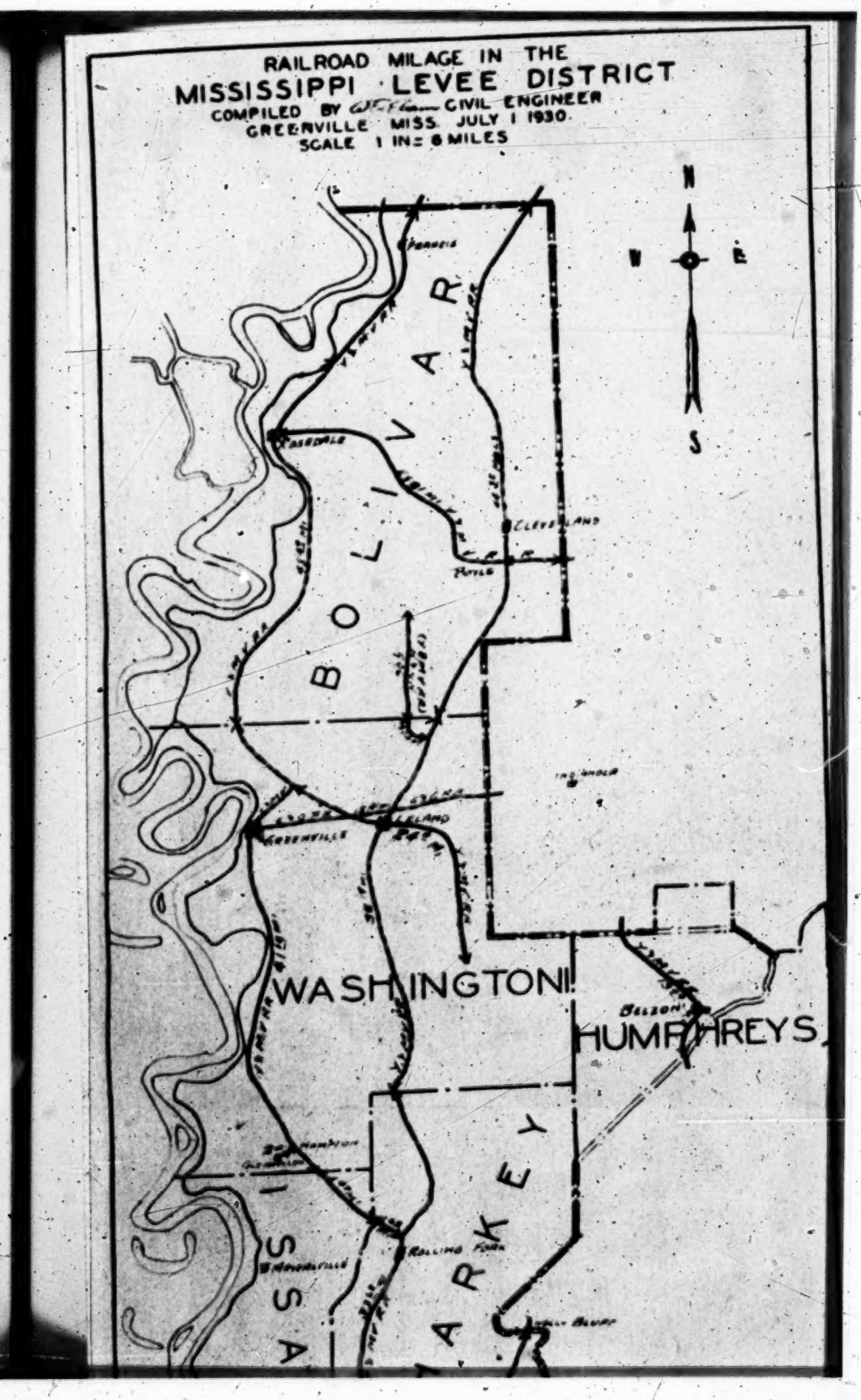
Section 9280. Penalty for violation of this act.—2. Any person or corporation violating the provisions of this act shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $100 nor more than $1000, and in addition thereto any person giving an order, permitting or requiring an employee of any railroad to violate the provisions of this act shall be guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment in the county jail not less than ten nor more than thirty days. (Laws 1908, Ch. 95. In effect March 16, 1908).

Section 9281. Damages for injuries resulting from violation of the provisions of this act shall be liable for injury or damage caused to any person by reason thereof, notwithstanding the negligence of the party injured or damaged. (Laws 1908, Ch. 95. In effect March 16, 1908).

Section 9284. Full crew law.—Prescribing number of employees for a train crew.—1. It shall be unlawful for any railroad propelled by steam doing business in the State of Mississippi, to operate or run over its lines, or any part thereof, or suffer or permit to be run over its lines, or any part thereof, outside of the yard limits, any passenger, mail or express train carrying passengers, or any freight train which is not manned with a crew consisting of one engineer, one fireman, one conductor, one brakeman or porter and one competent flagman. (Laws 1914, Ch. 170. In effect March 5, 1914).

Section 9285. Penalty for operating with short crews. —2. Any railroad company doing business in the State of Mississippi who shall send out on its road, or cause to suffer or permit to be sent out on its road, or any part thereof, outside of the yard limits, any train of the classes enumerated in Section 1, which is not manned in accordance with the provisions of that section, shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1000.00) for each offense. (Laws 1914, Ch. 170. In effect March 5, 1914).

Section 9286. Act not to apply in certain cases.—3. Nothing in this act shall be held as applying to any case of disaster or disability of any member, or members, of the crew arising while out on the road between division terminals, or to relief trains, or wrecking trains where men are not available; provided, this act shall not apply to branch or independent roads not over fifty miles in length.(Laws 1914, Ch. 170. In effect March 5, 1914).


RAILROAD MILAGE IN THE
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HUMPHREYS
SHARKEY
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CLEVELAND
GREENVILLE
VICKSBURG

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CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

NO. 195.

COLUMBUS & GREENVILLE RAILWAY COMPANY, ET AL.,

VS.

W. J. MILLER, STATE TAX COLLECTOR.

REPLY BRIEF FOR PETITIONERS-APPELLANTS

W. H. WATKINS,
A. E. GARDNER, Sr.,
R. C. STOVALL,
A. F. GARDNER, Jr.,
H. T. ODOM,
Attorneys for Petitioners.

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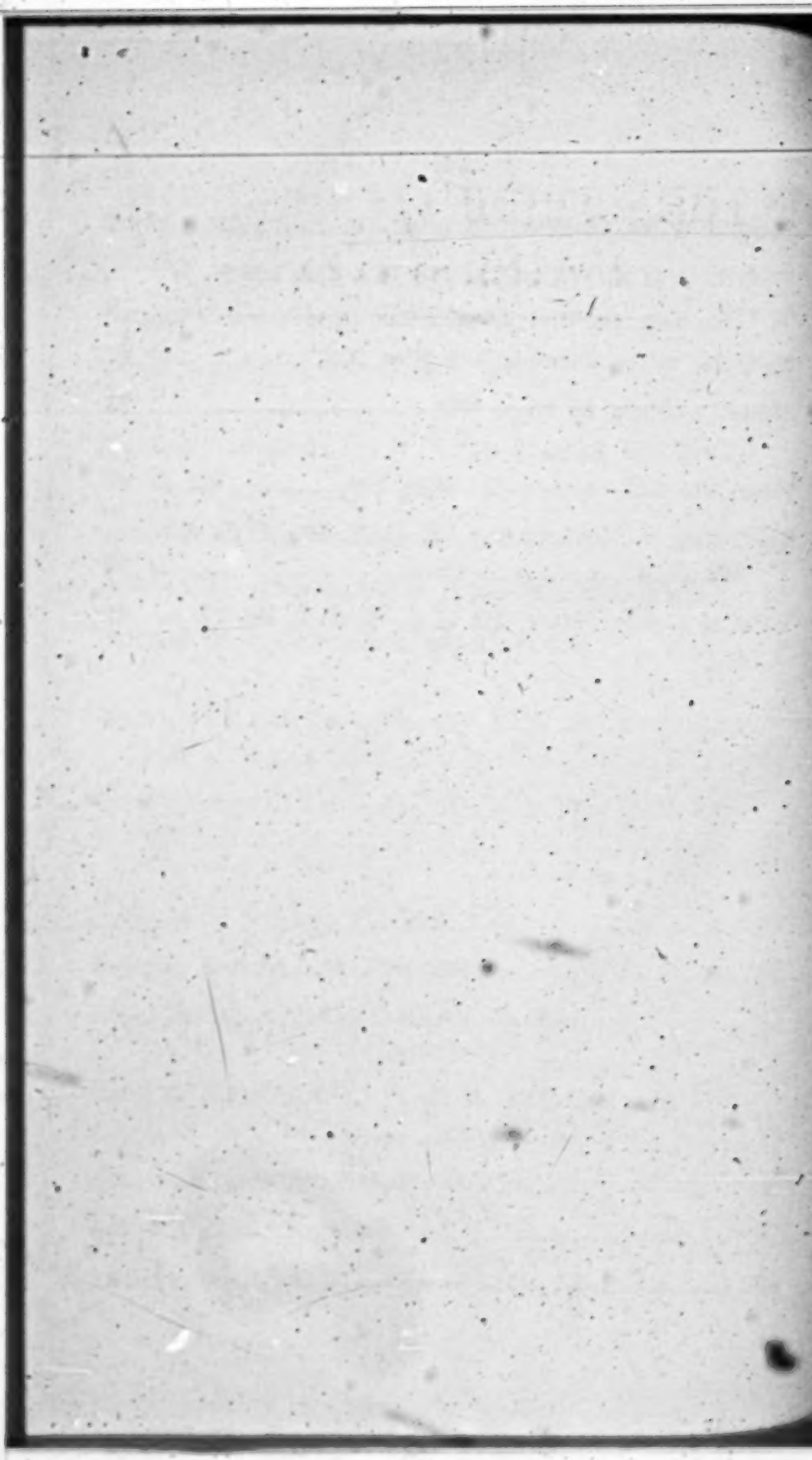
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

NO. 195.

COLUMBUS & GREENVILLE RAILWAY COMPANY, ET AL., VS. W. J. MILLER, STATE TAX COLLECTOR.

REPLY BRIEF FOR PETITIONERS-APPELLANTS

I. UNCONSTITUTIONALITY OF ACT OF 1914

The brief for appellee makes little effort to contest appellant's contention that the railroad mileage tax for the Mississippi Levee District is void because of denial of equal protection of the laws for the reason that the amount of the tax imposed under the arbitrary mileage rule is greatly in excess of the tax which would be paid by appellant if taxed in the ordinary way on the basis of value and acreage. It stands undisputed that "Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality." *K. C. S. Ry. Co. vs. Road Improvement District* 256 U. S. 658. Appellee makes no effort to distinguish this case. The authorities cited on page 20 of the brief for the appellee, to establish the proposition that railroads may be put in a special class and taxed on a mileage basis are all based on the assumption that the amount of

the mileage tax is not greater than the amount which the railroad company would have had to pay if railroad property had not been placed in a special class. In *Pullman Company vs. Richardson* 261 U. S. 330, 339, the special tax on railroads was justified because it was "not in excess of what would be a legitimate tax on such property valued as part of a going concern, nor relatively higher than taxes on other classes of property." In *Great Northern R. R. Co. vs. Minnesota* 278 U. S. 503, 509 the special railroad tax was sustained because, the court said, "we find nothing in the record to indicate that the tax under consideration plus that already collected exceeds 'what would be legitimate as an ordinary tax on the property valued as part of a going concern, (or is) relatively higher than the taxes on other kinds of property' ". In *General American Tank Car Co. vs. Day* 270 U. S. 367 it was affirmatively found that the tax involved was the substantial equivalent of the ordinary local taxes. The brief for appellee wholly ignores the vital fact that the amount of this mileage tax at $350.00 per mile is 70 times greater than this appellant would pay if taxed as other taxpayers in the district, and even if the tax is reduced in accordance with the amendment of 1926 to $50.00 per mile still that amount is ten times as great as would be paid by this appellant if taxed as other property in the district. Appellee further ignores the fact that this discrimination is not the result of an accidental misfortune of this particular railroad but that the mileage tax is unequal and grossly discriminatory as to all railroads in the district. The only other railroad in the district is The Yazoo & Mississippi Valley Railroad which if taxed on the ordinary basis

of value and acreage, as other property in the district, would pay less than half the amount of the arbitrary mileage tax. In this situation the tax clearly comes within the rule expressed in *Holden vs. Hardy* 169 U. S.366, 398. "The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class." It is obvious that the railroad mileage tax at the present rate, when compared to the taxes imposed on other property in the Mississippi Levee District results in unjust discrimination, oppression and the spoliation of railroads. It is such taxation as this which forced this railroad property into a federal receivership from which it emerged in 1923.

Appellee says that the Mississippi constitution recognizes the mileage tax and expressly approves it, as was stated by the Supreme Court of Mississippi at the hearing of this case in the lower court. But they again overlook the question of the amount of the mileage tax as compared with ordinary taxation. The Supreme Court of Mississippi also ignored the question of the amount of the mileage tax. At the time the constitution of 1890 was adopted the mileage tax was fixed by the Act of 1886 at $100.00 per mile for main trunk lines and $60.00 per mile for branch or feeder lines, and at that time the rate of taxation on other property in the Mississippi Levee District was fixed by the Act of November 27, 1865, as amended January 27, 1877 and February 25, 1878, at 5 mills on the dollar and the cotton tax at 2/5 of 1c per pound. By a gradual process the tax burden has been shifted so that the ad valorem tax was 4 mills

for 1926 and 5 mills for 1927, substantially the same rates in force when the constitution of 1890 was adopted; the cotton tax and the acreage tax were substantially the same, but the railroad mileage tax had been increased arbitrarily to 3½ times the original amount, and this in defiance of the spirit of the Mississippi constitution which states, referring to levee taxes, that "all reductions in such taxations shall be uniform." The Mississippi constitution authorizes the legislature to tax railroads for levee taxes on the mileage basis, but it does not authorize such a high rate per mile as to result in arbitrary discrimination and spoliation.

Appellee says that the Mississippi Levee District is not the only local improvement district which taxes railroads on the mileage basis. They mention in their brief that the Mississippi Delta region is divided into two levee districts, one of which is called the Mississippi Levee District and the other the Yazoo Mississippi Delta Levee District, but they do not mention the fact that in the Yazoo Mississippi Delta Levee District it has never been the practice to put railroads in a special class. In that district railroads are taxed on the ad valorem basis and the acreage basis like other property and are also subject to a moderate license tax for the privilege of carrying on intra-state business varying from $10.00 to $90.00 per mile according to the class of railroad, just as all other businesses carried on in the Yazoo Mississippi Delta Levee District are subject to occupation taxes, and that these license taxes both for railroads and other businesses are state wide. See Chapter 158 Laws of Mississippi 1884 Sction 14 and Chapter 80 Acts of 1902.

Appellee mentions several Louisiana levee districts which tax railroads on a mileage basis. We need go no further than the facts stated in appellee's brief to show that they give no comfort to appellee in this case. On page 16 of the brief for appellee it is stated that The Atchafaylaya Basin Levee District raises its revenues by a tax of $60.00 per mile of railroad main line in said district, an ad valorem tax of 10 mills on all property except railroads and a tax on cotton, sugar and other produce. Compare those rates with the amounts which appellee here endeavors to defend. There the ad valorem tax rate was 10 mills as compared with the railroad mileage tax of $60.00 per mile. In the present case the ad valorem tax is 4 mills for 1926 and 5 mills for 1927 and the railroad mileage tax $350.00 per mile. The brief for appellee, on the same page states that The Pontchartrain Levee District of Louisiana has a railroad mileage tax of $100.00 per mile, but does not state the amount of the other taxes with which it must be compared. On page 17 of said brief it is stated that in 1904 the State of Louisiana created the Red River and Bayou Desglaizes Levee & Drainage District with a revenue system which taxed property, except railroads, on the ad valorem basis at the rate of 10 mills, and included an acreage tax of 5c and a mileage tax on railroads at $60.00 per mile; and that in 1928 the acreage tax was increased to 25c and the mileage tax to $100.00 per mile. In 1928, therefore, this levee district had an ad valorem tax of 10 mills, an acreage tax of 25c per acre and a railroad mileage tax of $100.00 per mile. Compare these rates with those which appellee attempts to defend for the Mississippi Levee District where the ad valorem tax

paid by all other property owners, except railroads, is at the rate of 5 mills, one-half the Louisiana rate; the Mississippi acreage tax is 5c per acre (this is the maximum allowed by the state constitution) one-fifth the Louisiana rate; and the mileage tax on railroads is $350.00 per mile or 3½ times the Louisiana railroad mileage rate. It is obvious that either the Louisiana legislators must be guilty of gross discrimination in favor of railroads, or else the Mississippi legislators are guilty of gross discrimination against railroads. When we figure the aplication of these taxes it is clear that it is Missisippi which has become guilty of discrimination. An ad valorem tax at the rate of 5 mills on a railroad valued at $20,000 per mile would produce only $100.00 per mile in taxes. The record shows that of the two railroads in Mississisppi Levee District one of them is assessed as high as $32,000 per mile and the other as low as $1,000 per mile. It is to be presumed that these assessments are fairly and honestly made in the same proportion of true value as other property in the district. It is an inherent defect of an arbitrary railroad mileage tax, in a district where the railroads are of greatly unequal value, that it must necessarily unduly favor one railroad or unduly discriminate against the other.

The brief for appellee makes the further contention that if the railroad mileage tax is unconstitutional the cotton tax is also unconstitutional, and that the entire system of taxation used in the Levee District must be unconstitutional. (Brief for appllee page 18). In view of the facts in the case such a contention seems as absolute *non sequitor*. The unconstitutionality of the railroad mileage tax arises

from its excessive amount. The legislature of Mississippi was not content to leave the mileage tax at $100.00 per mile as fixed in 1886. The general plan of taxation in the Mississippi Levee District is set out in Chapter 156 Mississippi Laws of 1896 imposing an acreage tax of 5c, an acre, an ad valorem tax of 5 mills on all property real and personal in the district, and a cotton tax of 1/5 of 1c per pound. In 1908 the Act of 1896 was amended so as to authorize increases in these rates and at the same time the railroad mileage rate was increased from $100.00 per mile to $200.00 per mile. In 1914 the Act of 1896 was again amended so as to authorize increases, and the railroad mileage tax was again increased in proportion. Subquently the other taxes were greatly reduced without any reduction in the railroad mileage tax thereby creating the gross inequality against which we seek protection. The validity of the acreage tax was sustained by the Supreme Court of Mississippi in the case of *Smith v. Willis* 78 Miss. 243 where the taxpayer objected that his land was above flood waters and could not be benefited by the levees. The Supreme Sourt of Mississippi said: "The doctrine of comparative benefits and graduation of levee tax servitudes does not apply to the Mississippi Levee District". The constitutionality of the cotton tax was sustained by the Supreme Court of Louisiana in the case of *Excelsior Planting & Mfg Co v. Green* 39 La. Ann. 455, 1 Sou. 873, at page 880. If the legislature of Mississippi, by putting railroads in a class to themselves for levee tax purposes, imposed an arbitrary mileage tax on them at an excesively high rate, and if the Supreme Court of Mississippi is within its rights in refusing to permit the legislature to classify railroads so as to relieve this appellant of some

of the discrimination against it, then they must bear the responsibility for having the entire railroad mileage tax declared unconstitutional and void; and the result of such invalidity would obviously be that railroads would be taxed in the Mississippi Levee District as all other property on the basis of value and acreage. Under the present plan of taxation the most valuable cotton mill in the Mississippi Delta was taxed for levee purposes for the years 1926 and 1927 at the rate of 4 mills or 5 mills on its assessed valuation plus a tax of 5c per acre. Railroad property in the levee district is entitled to the same treatment.

The chief reliance of counsel for appellee on this point seems to be their contention that the Columbus & Greenville Ry. Co. is estopped to contest the validity of this tax because that corporation was organized in 1923 after the railroad mileage tax had been in existence for many years. To support this contention they cite four cases. The case of *Hines Co. v. Guillot, Sheriff*, 153 La. 319, 95 Sou. 749 held that the plaintiff company was estopped to contest the validity of the acreage tax of 10c an acre for levee purposes on the authority of *Duffy v. Peneguy* 148 La. 407, 87 Sou. 25. In the latter case the defendant was held estopped to contest the validity of a tax sale, where land was sold for levee taxes, because he had stood by while the land was being sold without warning the purchaser, and because he himself had bought the land at a prior sale for similar taxes so that if the tax should have been held void not only the plaintiff's title but also the defendant's title would have been invalidated. In *State v. C. & N. W. Ry. Co.* 128 Wis. 449, 108 NW 594 the court held that in Wisconsin privilege taxes are not based on

the power of taxation but are based on a contractual obligation; that a company which exercises a privilege by authority of the laws of Wisconsin is under a contractual obligation to pay the privilege tax imposed for that franchise. The case of *Ford v. Delta Pine & Land Co.* 164 U. S. 662 cited by counsel for appellee has absolutely no application in this connection, and did not involve in any way the doctrine of estoppel. It involved the principle of stare decisis.

Whatever may be said as to the validity of the reasoning in those cases, on their peculiar facts, it is evident that in the present case there are none of the elements of the doctrine of estoppel. The doctrine of estoppel is based on well defined priciples. The person estopped must have acted or spoken or failed to act, or failed to speak, under such circumstances as to mislead another person to his injury, so that it would be inequitable to allow a change of position. The present case is more nearly like that described by the Supreme Court of Louisiana in *Morgan, etc. Co. v. Aucoin* 140 La. 768, 73 Sou. 859 where the court said that the mere fact that the plaintiff railroad company had paid the levee tax from 1908 to 1914 at exactly the same rate "could not possibly be good ground for continuing to pay it". The decision of the lower court was reversed. In *K. C. S. v. Ogden Levee District* 15 *F.* (2d) 637 (affirmed again 39 F. (2d) 884) it was held that the mere fact that the railroad company had paid the levee tax for a number of years without protest during which time bonds had been issued by the levee district did not create an estoppel.

It is true that the present appellant the Columbus & Greenville Ry. Co. was organized in 1923 for the purpose of

buying and operating the Columbus & Greenville Railway. But it is also true that the railroad now known as the Columbus & Greenville Railway was constructed in the Mississippi Levee District many years ago when the railroad mileage tax rate was much smaller than the present rate. If the original owners had not been driven into a receivership they would probably have still owned the property and would under the two cases cited next above have lost none of their rights to contest the validity of this tax. It is unreasonable to hold that the forced sale of the property by reason (among other causes) of the burden of excessive taxation, should cause a loss of the right to contest the validity of such taxation. Furthermore, the burden of proof is on those pleading estoppel to prove the facts on which it is based. There is nothing in this case to prove the rate of ad valorem taxation in the Mississippi Levee District during the year 1923 when the Columbus & Greenville Ry. Co. was organized. The invalidity of the mileage tax, we repeat, arises because of its excessive burden when compared with the tax burdens borne by other property owners in the district. As was said by the court in the Ogden Levee District cases 15 F. (2d) 637 and 39 F. (2d) 884 these levee taxes are assessed anew each year and the validity of the tax for each year constitutes a separate question. The railroad mileage tax at any given rate might be valid for one year where the taxes on other properties in the district were substantially equal, and the same railroad mileage tax might be invalid the following year because of great reductions made in other taxes without reducing the railroad mileage tax.

REPLY TO THAT PORTION OF RESPONDENT'S BRIEF RESPECTING CONSTITUTIONALITY OF THE ACT OF 1926 AS APPLIED TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In the case of *Clarke v. Maxwell*, (N. C.) 150 S. E. 190, the court had under reveiw a statute imposing a privilege tax for operation of motor vehicles, etc., between termini exceeding fifty miles. The statute was in the following language:

> "Every person, firm, or corporation, their lessees, trustees receivers, engaged in the business of operating automobiles or other motor vehicles, trucks, tractors, trailers, or semi-trailers, for the transportation of property over the public highways of this State for compensation between termini for a distance of greater than fifty (50) miles, either upon call, prearrangement, contract, lease, or other arrangement, shall apply for and procure from the Commisioner of Revenue a State license for the privilege of engaging in such business and shall pay for such license an annual tax as follows:
>
> "For each such motor-propelled vehicle, truck, tractor, trailer, or semi-trailer of a rated carrying capacity of less than three tons, at the rate of forty-five dollars ($45) per ton.
>
> "For such motor-propelled vehicle, truck, tractor, trailer, or semi-trailer of a rated carrying capacity of three tons or over at the rate of seventy-five ($75) per ton."

The Supreme Court of North Carolina held that the

Act was a proper classification, using the following language:

> "Upon this principle, the classification made by the General Assembly of this state for purposes of taxation of persons, firms, or corporations engaged in the business of operating motor-propelled vehicles, for the transportation of property on the public highways of the state, for compensation, must be sustained. All persons, firms, or corporations engaged in such business are required to pay a license tax. None are exempt. The amount of the tax is determined by the class in which each person, firm, or corporation is included. The distinction between those who transport property over the public highways of the state, for compensation, between termini which are less than 50 miles distant from each other (subsection 2, Par. 165, c. 345, Pub. Laws 1929), and those who transport property over said highways also for compensation sometimes between termini which are less, and sometimes between termini which are more, than 50 miles distant from each other, dependent upon the contract with each customer (subsection 3, Par. 165, c. 345 Pub. Laws 1929), is, we think, reasonable and not arbitrary. The privilege of engaging in the latter business is more valuable than the privilege of engaging in the former business only. The service furnished by the state to the former is less expensive than the service furnished to the latter. It cannot be said that it is unjust for the state to require a larger license tax to be paid by the licensee who acquires by his license the more valuable privilege, at a greater cost to the state. We cannot hold as a matter of law that classification made in this instance by

the General Assembly is void, for that the line separating the two classes is arbitrary.

"It has been held in numerous cases by the Supreme Court of the United States, whose decisions are authoritative with us upon the question as to whether the statute involved in the instant case is in violation of section 1 of the Fourteenth Amendment of the Constitution of the United States, that the provisions of said section do not forbid clasifications by the state of subjects of taxation, and that the power of the state to clasify for purposes of taxation is of wide range and flexibility, subject only to the limitation that the calssification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Louisville Gas & E. Co. v. Coleman*, 277 U. S. 32, 48 S. Ct. 423, 72 L. ed. 770, and cases cited. In *Brown-Forman Co. v. Kentucky*, 217 U. S. 563, 30 S. Ct. 578, 580, 54 L. ed. 883, it is said: 'A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, business, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection of clasification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.'

The last above-mentioned case was reviewed by this Court in *W. C. Clarke Appellant, vs. A. J. Maxwell, Commisioner etc.*, No. 52 on the docket of this Court October

Term 1930. The judgment of the Supreme Court of North Carolina was affirmed by this court with memorandum opinion wherein this Court cited *Carley & Hamilton vs. Snook*, 281 U. S. 66, 74 L. ed 704, 68 A. L. R. 194, 50 S. Ct. 204; *Packard vs. Branton* 264 U. S. 140, 68 L. ed. 596, 44 S. Ct. 257; *Clark vs. Titusville*, 184 U. S. 329, 46 L. ed. 569, 22 S. Ct. 382 (Reported in Advance Sheets, 75 L. ed. 262, 282 U. S. ——.) This decision is decisive of the present case.

Counsel cites *A. & P. Téa Company vs. Daughton*, 144 S. E. 701, 196 N. C. 145. It is interesting to note that the Supreme Court of North Carolina distinguished that case in the case of *Clarke vs. Maxwell*, Supra, in the following language:

> "The distinction between the statute involved in this case and the statute which we held void in *Great Atlantic & Pacific Tea Co. vs. Daughton*, 196 N. C. 145, 144 S. E. 701, is, we think, obvious. The classification made, as contended by the defendant in that case, was not founded upon any reasonable or substantial ground. That statute also unjustly discriminated between the plaintiffs who owned and operated six or more stores, all of which were taxed, and other merchants, who owned and operated five or less stores, all of which were exempt from the tax imposed by the statute upon plaintiffs.

Appellee likewise cites *Louisville & Gas Electric Company vs. Coleman*, 277 U. S. 32, 48 Sup. Ct. 423, 72 L. ed. 770. In that case this Court held that the classification of mortgages for purposes of taxation upon the basis of the maturity of the indebtedness secured by the mortgage was

arbitrary and void. That case is clearly distinguishable from the one under discussion.

Appellee also cites *Cotting vs. Goddard*, 183 U. S. 79, 46 L. ed. 92. The Court in that case did not have under review a taxing statute but upon the other hand before it a a law dealing with the police of the state to legislate for the well-being of the people thereof. The Court held under the facts in that case that a classification based upon the numbr of cattle received at the stockyards was arbitrary and afforded no reasonable basis for classification. The statute in that case restricted the charges which should be made by certain corporations for receiving and selling live stock; whereas no similar charge was made on other corporations engaged in a similar line of business. In the present case, however, we have demonstrated that the Columbus and Greenville Railroad Company was of inferior construction, incapable of rendering the same class of service as the Yazoo & Mississippi Valley Railroad Company; that it could not possibly receive the same degree of benefit and protection from the levee system as could the Yazoo & Mississippi Valley Railroad Company. This statement alone would justify the classification. It must be borne in mind, however, that in matters of taxation the Legislature of a State has a broader power of classification.

In the case of *Citizens Telegraph Company vs. Fuller*, 229 U. S. 322, 57 L. ed. 1206, this Court used the following language:

> "It may therefore be said that in taxation there is a broader power of classification than in

some other exercises of legislation. There is certainly as great a power, and the rule appellant urges can not be adopted. It is inconsistent with the principle of classification and the cases which have explained the principle and the range of its legal exercise."

Appellees' counsel cite the case of *Fiscal Court of Owen County vs. S. & A. Cox Company* (Ky.) 117 S. W. 296, 21 L. R. A. 283, wherein a tax of $75.00 on a three-horse wagon operating for business and a tax of $200.00 on each four-horse wagon operated for business, was held to be arbitrary. It must be remembered, however, that in the present case petitioner has offered undisputed proof tending to show that the Columbus & Greenville Railway Company, Petitioner, owing to the many differences to which the attention of the Court has been directed, required different classification from that of the Yazoo & Miss. Valley Railroad Company; and that the Act of 1926, now under review, was passed by the legislature of the State of Mississippi, for the purpose of removing the discrimination which the evidence in this case shows the petitioner suffered under the Acts of 1914.

The last above-mentioned case contained no such statement of facts.

Other cases cited by Respondents' counsel will readily distinguish themselves by the application of the foregoing principles.

EFFECT OF THE CLASSIFICATION CRITICISED BY RESPONDENT

Counsel argue that the act of 1926 placing a tax of $50.00 per mile on the Columbus and Greenville Railway Company within the district discriminates against the Yazoo and Mississippi Valley Railroad Company. (a) Counsel states that a narrow gauge railroad company would have to pay $87.50 per mile for the privilege of operating its line in the district, whereas the petitioner would pay $50.00. There are a number of replies to this contention: one which we deem sufficient is that the record with exhibits undisputedly shows that there are no narrow gauge lines of railroad in the district. The court will find attached to the record and briefs a map showing the railroad mileage in the Mississippi levee district. A comparison of this map with the classification (R. 43) and the appendix to petitioner's original brief on page 44 will demonstrate that the only two railroads in the district and the only two which were in the district at the time the act was passed, were the Yazoo and Mississippi Valley Railroad and the Columbus and Greenville Railway, neither of which are narrow gauged roads. There will be no dispute upon this question. This contention was therefore foreclosed adversely to the respondent in the case of *Crescent Cotton Oil Co. vs. State of Mississippi*, 257 U. S. 129, 66 L. ed. 166, wherein the court used the following language:

> "The record before us shows that before the law assailed was enacted, cotton gins had been operated in Mississippi by individuals as well as by corporations, but there is no showing that oil mills

and cotton gins were both operated by an individual or by groups of individuals."

The case of *Pullman vs. Knott*, 235 U. S. 23, 59 L. ed. 105, is directly in point.

(b) Counsel point out that there are in the levee district, as indicated on the map, several feeder or branch lines of the Yazoo and Mississippi Valley Railroad Company which are required under the terms of the act to pay $210.00 per mile. There are a number of obvious replies to this argument. (1) Petitioner is entitled to have the validity of the act of 1926 in respect to the 14th amendment measured by a comparison with the main line of the Yazoo and Mississippi Valley Railroad Company. It is, of course, elementary that strict scientific accuracy in matters of classification are not required.

In the case of *Mutual Loan Co. vs. Martell*, 56 L. ed. 175 (222 U. S. 225), this court said:

> "Legislation cannot be judged by theoretical standards: it must be tested by the concrete conditions which induced it."

And again the court said:

> "We shall only repeat that the classification need not be scientific nor logically appropriate, and if not palpably arbitrary, and is uniform within the class, it is within such discretion."

In the case of *Dominion Hotel vs. State of Arizona*, 249 U. S. 265, 63 L. ed. 597, the court used the following language:

"The 14th Amendment is not a pedigogical requirement of the impracticable. The equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way. The power of the state 'may be determined by degrees of evil, or exercised in cases where detriment is specially experienced.' *Armour & Company vs. North Dakota*, 240 U. S. 510, 517, 60 L. ed. 771, 776, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548. It may do what it can to prevent what is deemed an evil, and stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rule laid down were made mathematically exact. The only question is whether we can say on our judicial knowledge that the legislature of Arizona could not have had any reasonable ground for believing that there were such public considerations for the distinction made by the present law. The deference due to the judgment of the legislature on the matter has been emphasized again and again. *Hebe Co. vs. Shaw*, 248 U. S. 297, 303, ante, 255, 258, 39 Sup. Ct. Rep. 125. Of course, this is especially true when local conditions may affect the answer, —conditions that the legislature does, but that we cannot, know. *Thomas Cusack Co. vs. Chicago*, 242 U. S. 526, 530, 61 L. ed. 472, 475, 476, L. R. A. 1918A, 136, 37 Sup. Ct. Rep. 190, Ann. Cas. 1917C, 594."

(2) It is only necessary that uniformity exist as to persons in the same class. The act divides, as is conceded in respondent's brief, railroads into four classes: (1) Narrow gauge railroads; (2) feeder of branch lines; (3) standard

main lines, more than 25 miles in length; (4) Main lines not exceeding 25 miles in length. In other words, main lines are divided into two classes: those exceeding 25 miles and those which may not exceed such distance. Branch or feeder lines are in an entirely different class from that of the petitioner.

In the case of *C. & O. Ry. Co. vs. Atty.-Genl.*, 230 U. S. 513, 57 L. ed. 1597, the court used the following language:

> "If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws."

In *Clark vs. Titusville*, 184 U. S. 329, 46 L. ed. 569, the court used the following language:

> "Manifestly there was inequality between the members of different classes, and that was conceded in the opinion, but as manifestly there was equality between the members of each class, and that equality was held to satisfy the Fourteenth Amendment to the Constitution of the United States; and the reasoning by which that conclusion was supported is applicable to the case at bar. We met the contention accurately and squarely that there was no reasonable distinction between the classes."

Other cases directly in point are *Balls Gap R. R. Co. vs. Pa.* 134 U. S. 232, 33 L. ed. 892; *C. B. & Q. Ry. Co. vs. Cutts*, 94 U. S. 155, 24 L. ed. 94; *Lowe vs. Kansas*, 163 U. S. 8, 41

L. ed. 78; *Fort Smith L. & T. Co. vs. Paving District*, 274 U. S. 387, 71 L. ed. 1112; *Quaker City Cab Co. vs. Pa.* 277 U. S. 389, 72 L. ed. 770.

There are only two standard gauge main lines of railway in the levee district, and as to whether or not the act of 1926 is discriminatory, such discrimination must be determined by a comparison with the main line of the Yazoo and Mississippi Valley Railroad Company. By reference to the classification of railroads in Mississippi had by the Railroad Commission of the state (R. 43), the Columbus & Greenville Railway Company is the only main line railroad in the state of Mississippi classed as number three, and the supreme court of the state of Mississippi has decided that this classification is binding upon it. *R. R. Co. vs. State*, 110 Miss. 290, discussed in original brief p. 25. As a matter of fact the Road from Rosedale to Dockery is not a branch line, but a main line, classified by the Miss. Railroad Commission as a No. 2 Main line (R. 43).

(3) Again, these branch lines of the Yazoo and Mississippi Valley Railroad Company, referred to, are feeders for and form part of the great Yazoo and Mississippi Valley system. An examination of the map attached to petitioner's original brief shows that the Yazoo and Mississippi Valley system, with its main lines and branches, thoroughly covers the levee district, north and south. A classification based upon a main line not exceeding 25 miles in length, under the facts and circumstances in this case, and a branch or feeder line forming part of a great trunk line system, rests upon an entirely rational difference, and the classification would be justified by that difference alone. We are attach-

ing as Appendix No. 1 to this brief the cotton production in the state of Mississippi during the years 1928 and 1929. An inspection thereof reveals the fact that in the year 1929 the counties comprising the territory in which this levee district is situated produced approximately 375,000 bales of cotton. This was more than one-fifth of the total production by the state of Mississippi, almost as much cotton as was produced in the entire state of Tennessee, approximately half as much as was produced by the state of Louisiana. This territory forming the delta of the Yazoo and Mississippi rivers is one of the most fertile spots in the world. The Yazoo and Mississippi Valley Railroad Company, with its main lines and branches, traverses it in every direction. Upon the other hand, the Columbus and Greenville Railway Company runs at right angles from the river and operates for the most part, after leaving the levee district, through a hilly and non-productive section of the state of Mississippi. It necessarily appears not only that it was proper to place the Columbus and Greenville Railway Company, the Yazoo and Mississippi Valley and its branches in a different classification, but fairness would require that this be done.

(4) Respondent's counsel (p. 25 of brief) makes the statement that the petitioner filed a statement with the Interstate Commerce Commission for the purpose of fixing rates at a valuation of $38,000 per mile. It is sufficient to say that there is nothing in the record to disclose any such statement. At R. 56 is a tentative valuation as of June 30, 1915, of the property of the Southern Railway Company in Mississippi, the predecessor in title to Petitioner. The tentative valuation dealt with a main line of 179 miles, where-

as the main line of the petitioner is 169 miles. Besides, the tentative valuation included 58,353 miles of branch lines and 59,508 miles of yard tracks and sidings, and necessarily included property of every kind, including the yard facilities, terminals at Columbus, Mississippi, and other properties. The question of valuation for the purpose of rate-making rests upon a different basis than that of taxation. Upon the question of rate-making the matter of cost of reconstruction is entitled to a very great weight. *St. L. & O'Fallon Ry. vs. United States of America*, 73 L. ed. 798, 279 U. S. 461. When we approach the matter of taxation, however, the question involved is one of uniformity.

In the case of *Robert L. Green vs. L. & I. R. R. Co.* 244 U. S. 499, 61 L. ed. 1280, it is held that property is assessed at its full value whenever it is uniformly assessed, like other property.

In the case of *Knox, Atty-Genl. vs. Southern Paper Co.* 108 So. 288, 143 Miss. 870, the supreme court of the state of Mississippi used the following language, laying emphasis upon the importance of uniformity in questions of taxation:

> "But under the equality clause of the Fourteenth Amendment of the Federal Constitution as construed by the supreme court of the United States, if in assessing property for taxes either the requirement that it be assessed at its true value, or the requirement that its assessment shall be uniform and equal, is sacrificed, it must be the former and not the latter."

Even if it be true, however, that the property of petitioner in its entirety was of the value stated and it produced a revenue of $159,392.08 in the year 1925, this was a yield slightly more than three per cent with value of the company's property as fixed by the Commerce Commission. It undisputedly appears, however, from the record in this case that the property of the Yazoo and Mississippi Valley Railroad Company, when assessed in accordance with uniform rules, which are assumed to prevail in the state of Mississippi, is assessed at and is therefore valued at thirty-two times as much as that of the petitioner, which would of itself not only justify the classification but require entirely a different basis of classification for taxation. Taxation is not a matter of theory: it is a practical proposition. Under the act of 1926 we have a legislative declaration as to the proper contribution which the Columbus and Greenville Railway Company should make towards the maintenance of the local improvements in the district consisting of levees along the Mississippi river. Therefore, the burden of proof rests upon the respondent to prove by competent evidence that the legislative declaration is arbitrary and discriminatory. See case of *Memphis & Charleston R. R. Co. vs. Pace*, decided Jan. 1, 1931, Advance Sheets, 75 L. ed. 178, 281 U. S. ——. Respondent not only offered no proof in respect thereto, but successfully maintained the position before the supreme court of the state of Mississippi that no evidence upon the subject was competent or would affect the result.

(5) Referring again to the position of respondent's counsel that certain branches of the Yazoo and Mississippi Valley Railroad Company are discriminated against under

the act of 1926 now under review, in addition to what we have above stated in reply to this argument, we state that the Yazoo and Mississippi Valley Railroad Company is not objecting thereto, has not complained of the discrimination, and the respondent occupies no relation which entitles him to urge the point. *Hebring vs. Claire A. Lee*, 280 U. S. 111, 74 L. ed. 217; *Thomas Cusack Co. vs. Chicago*, 242 U. S. 526, 61 L. ed. 472; *Hooker vs. Burr*, 194 U. S. 415, 48 L. ed. 1046; *Flint vs. Stone-Tracy Co.* 220 U. S. 107, 55 L. ed. 389.

DECISION DOES NOT REST ON QUESTION OF STATE LAW.

The Supreme Court of the state of Mississippi did not base its decision upon any construction of the constitution of the state of Mississippi. Upon the other hand, without reference to the constitution of the state of Mississippi, it held that the act in question violated the fourteenth amendment to the constitution of the United States, and, therefore, was void upon its face. The rule contended for by opposing counsel has no application except where the decision of the state court is put upon a federal and a non-federal ground, and if the non-federal ground is broad enough to sustain the judgment, this court will not review the federal question. See *McCoy vs. Shaw*, 277 U. S. 302, 72 L. ed. 891, and cases therein cited. In the case of *Illinois Central v. Messina*, 240, U. S. 395, 60 L. ed. 709, this court held that wherever the supreme court of the state thought it necessary to construe a federal act, it indicated that such construction was material to the result. So in this case, the supreme court of the state of Mississippi did not mention the state constitution but expressly put its decision upon the four-

teenth amendment to the federal constitution, it conclusively indicated that the supreme court of the state of Mississippi thought such construction necessary to reach the result which it did. The decision of the supreme court of the state of Mississippi legally amounts to the announcement that in so far as the constitution of the state of Mississippi was concerned, the act of 1926 did not violate any portion thereof. Section 14 of the Bill of Rights of the state of Mississippi contains the following language:

> "No person shall be deprived of life, liberty or property except by due process of law."

There is no provision, however, prohibiting a denial of the equal protection of the law. The provision is patterned after the fifth amendment to the constitution of the United States, which is controlling upon congress while the fourteenth amendment to the constitution of the United States, is applicable only to state legislature. *Hodges vs. U. S.* 203 U. S. 1, 51 L. ed. 61; *Twining vs. New Jersey*, 211 U. S. 78, 53 L. ed. 97; *Thorington vs. Montgomery*, 147 U. S. 490, 37 L. ed 252. The fourteenth amendment to the constitution of the United States prohibits deprivation of property without due process of law by a state, as well as the denial of the equal protection of the law, whereas the fourteenth section of the bill of rights of the state of Mississippi deals only with deprivation of property without due process of law, which has a fixed meaning in the jurisprudence of this country. *Civil Right Cases*, 109 U. S. 3, 27 L. ed. 835; *Simon vs. Craft*, 182 U. S. 427, 45 L. ed. 1165; *Hovey vs. Elliott*, 167 U. S. 409, 42 L. ed. 215. To be deprived of the

equal protection of the law means all persons are not treated alike under the same circumstances. *Leefer vs. Texas*, 139 U. S. 462, 35 L. ed. 225. *Waker City Cab Co. vs. Pa.*, 277 U. S. 389, 72 L. ed. 927.

Counsel for respondent call attention to the fact that in the state court they urged upon the supreme court of the state of Mississippi that the act of 1926 violated section 234 of the Mississippi constitution, which is found on page 36 of counsel's brief. The constitutional provision prohibits the passage of any law affecting the taxation or revenue in a levee district unless and until the act shall have been published as required therein. This was the constitutional question urged before the supreme court of the state of Mississippi. It had been thoroughly settled, however, by the supreme court of the state of Mississippi in a long line of cases that the court could not look beyond the enrolled bill passed by the legislature to determine as to whether or not such notice had been published. The leading case upon the subject from the supreme court of Mississippi was *Ex Parte Wren*, 63 Miss. 512. The case was referred to with approval by this Court in the opinion of Mr. Justice Harlan in *Marshall Field & Co. vs. Clark*, 134 U. S. 649, 36 L. ed. 294. Other cases from the supreme court of Mississippi directly in point are *State Ex Rel vs. Jackson*, 119 Miss. 729, *Adams, Rev. Agt. vs. Noble*, 103 Miss. 393, *Postal Telg. Co. vs. Shannon*, 91 Miss. 476, *Hunt vs. Wright*, 70 Miss. 307, *Swan vs. Buck*, 40 Miss. 269, *Riley vs. Ammon*, 143 Miss. 861, *Royal Ins. Co. vs. Levee Commissioners*, 95 Miss. 168, *Telg. Co. vs. Robertson*, 116 Miss. 204.

We respectfully submit that the judgment appealed from should be reversed.

W. H. WATKINS,
A. F. GARDNER, Sr.,
R. C. STOVALL,
A. F. GARDNER, Jr.,
H. T. ODOM,
Attorneys for Petitioners.

APPENDIX NO. 1.

DEPARTMENT OF COMMERCE, WASHINGTON
COTTON GINNED IN MISSISSIPPI:
CROPS OF 1929 AND 1928

The Department of Commerce, though the Bureau of the Census, announces the preliminary report on cotton ginned by counties, in Mississippi, for the crops of 1928 and 1929. The total for the state was made public Thursday, March 20, 1930. (Quantities are in running bales. Linters are not included.)

COUNTY	1929	1928
The State	1,875,155	1,462,021
Adams	5,589	4,890
Alcorn	16,207	13,585
Amite	11,062	8,240
Attala	16,132	13,415
Benton	7,646	5,756
Bolivar	168,733	128,043
Calhoun	10,759	8,299
Carroll	11,230	8,691
Chickasaw	19,553	13,091
Choctaw	4,873	4,257
Claiborne	7,674	4,686
Clarke	6,661	5,783
Clay	11,614	8,275
Coahoma	100,417	76,806
Copiah	9,723	7,574
Covington	12,913	12,749
DeSoto	32,232	24,832

Forrest	2,369	2,789
Franklin	3,093	3,008
George	3,407	3,013
Greene	855	679
Grenada	13,963	8,803
Hinds	30,084	25,896
Holmes	52,210	42,871
Humphreys	50,506	37,396
Issaquena	5,387	5,991
Itawamba	10,393	7,384
Jasper	13,214	11,992
Jefferson	9,549	6,698
Jefferson Davis	14,189	11,606
Jones	16,058	13,396
Kemper	11,989	9,988
Lafayette	13,328	9,874
Lamar	3,957	3,173
Lauderdale	15,657	13,045
Lawrence	12,965	10,090
Leake	21,026	17,965
Lee	36,385	25,599
Leflore	110,823	78,899
Lincoln	13,178	10,574
Lowndes	18,584	13,581
Madison	35,465	28,434
Marion	12,103	10,247
Marshall	24,649	16,891
Monroe	26,996	18,018
Montgomery	11,994	10,133
Neshoba	23,804	20,652
Newton	22,200	18,678

Noxubee	20,810	14,428
Oktibbeha	7,353	4,949
Panola	33,650	25,348
Perry	1,823	1,975
Pike	14,138	11,255
Pontotoc	20,061	14,592
Prentiss	15,255	11,874
Quitman	47,167	34,666
Rankin	10,237	8,342
Scott	16,212	12,033
Sharkey	28,550	29,885
Simpson	15,785	12,439
Smith	13,846	11,297
Sunflower	159,775	123,284
Tallahatchie	59,700	47,264
Tate	19,967	16,271
Tippah	22,105	15,956
Tishomingo	11,634	10,739
Tunica	36,917	28,649
Union	17,179	11,712
Walthall	14,502	11,310
Warren	5,645	5,710
Washington	103,495	75,134
Wayne	5,880	4,225
Webster	10,033	8,248
Wilkinson	3,921	4,338
Winston	13,782	11,736
Yalobusha	10,832	8,039
Yazoo	40,772	37,975
All Other	1,035	1,172

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 195

COLUMBUS & GREENVILLE RAILWAY COMPANY ET AL., PETITIONERS AND APPELLANTS,

vs.

W. J. MILLER, STATE TAX COLLECTOR, FOR THE USE OF THE MISSISSIPPI LEVEE DISTRICT, RESPONDENT AND APPELLEE.

MOTION FOR PERMISSION TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR APPELLANT AND PETITIONER.

WM. H. WATKINS,
A. F. GARDNER, SR.,
R. C. STOVALL,
A. F. GARDNER, JR.,
H. T. ODOM,
Attorneys for Petitioners and Appellants.

SUPREME COURT OF THE UNITED STATES.

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W. J. MILLER, STATE TAX COLLECTOR, FOR THE USE OF THE MISSISSIPPI LEVEE DISTRICT, RESPONDENT AND APPELLEE.

MOTION FOR PERMISSION TO FILE SUPPLEMENTAL BRIEF.

Now comes Columbus and Greenville Railway Company, petitioner and appellant in the above-styled cause, by its counsel of record, and moves the Court to file herewith a supplemental brief in reply to the supplemental brief filed on behalf of respondent and appellee.

Respectfully submitted,

WM. H. WATKINS,
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H. T. ODOM,

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W. J. MILLER, STATE TAX COLLECTOR, FOR THE USE OF THE MISSISSIPPI LEVEE DISTRICT, RESPONDENT AND APPELLEE.

SUPPLEMENTAL BRIEF OF APPELLANT AND PETITIONER.

The case of W. J. Miller, State Tax Collector, For Use of Mississippi Levee District *vs.* Yazoo and Mississippi Valley Railroad Company, decided Monday, February 23, 1931—a copy of the opinion being attached to the supplemental brief of appellee and respondent—has, we think, no bearing on this case. In that case Mr. Miller, who is the respondent and appellee in the present case, sued the Yazoo and Missis-

sippi Valley Railroad Company for the ad valorem tax for the Mississippi Levee District in addition to the mileage tax at the rate of $350.00 per mile. There was doubt whether the statute made the mileage tax a substitute for the ad valorem and acreage tax or in addition thereto. The Supreme Court of Mississippi has now construed the statute law to mean that the mileage tax is in lieu of the ad valorem tax.

Counsel for appellee contend that there can be no doubt that a tax on the mileage basis in lieu of the ad valorem tax and acreage tax is valid. We have at no time in the present controversy contended that the mileage tax is in addition to other taxes, as it seemed to us plain enough that it was not intended to be an additional tax. We do not contend that the mileage tax is void solely because it is a tax based on mileage instead of the ad valorem and acreage taxes. It would undoubtedly be a valid tax if the amount of mileage tax were substantially the same as the taxes which it replaces. We must again repeat, since appellee so persistently ignores the fact, that the basis of invalidity of the mileage tax is the uncontradicted fact that it so greatly exceeds the taxes which it replaces that it shows an undeniable intention to discriminate against railroads and to oppress them under the guise of classification. The agreement printed on page 70 of the Transcript shows that the appellant was assessed for ad valorem taxes at the time in question at $1,000.00 per mile. The record also shows a total assessment of the Columbus and Greenville Railway was approximately $18,410. The record shows on page 40

by the testimony of Mr. Easterling that the ad valorem rate for the year 1926 was four mills and 1927 five mills. Consequently if taxed on the ad valorem basis appellant's levee tax for the year 1927 would have been only $92.05 plus an acreage tax of five cents an acre. Instead of this amount it has already paid $920.00.

For convenient reference and in compliance with section 27, Rule 2 (*f*), we print herewith the pertinent portions of the statutes cited which have not previously been printed in the record.

"*Chap. 156, Page 167, Acts of 1896.*

"An Act entitled An Act to amend Chapter 63 of the Sheet Acts of 1892, being an Act entitled an act to provide for the appointment of the Levee Commissioners to raise revenue to maintain the Levee in the Mississippi Levee District and to authorize the issuance of bonds by the Board of Mississippi Levee Commissioners and for other purposes, so that the same may read as follows: * * *

"SEC. 7. There is hereby annually levied and assessed a uniform tax of five cents an acre on each and every acre of land in the counties of Bolivar, Washington, Issaquena, Sharkey and Warren, included in the Mississippi Levee District and not in any incorporated city, town or village in said district and divided into lots of less than one acre. And a tax of five cents is hereby levied and assessed on each lot of less than one acre in each city, town or village in said district.

"SEC. 8. There shall be and is hereby levied and assessed a uniform ad valorem tax of five mills on the assessed value of all property, real and personal, lying and situated in the counties of Bolivar, Washington, Issaquena, Sharkey and Warren included in the Mississippi Levee District, as the same shall appear upon the assessment rolls of said counties respectively, and which said tax of five mills shall be collected annually.

"SEC. 9. That the acreage tax and tax on lots levied and assessed above be, and the same is hereby declared a tax in rem upon the land included therein, which land shall be subject to sale without further assessment unless the tax thereon be paid on or before the 15th day of December in each and every year, including the year 1892, whether the owners thereof have personal estate subject to taxation or not and such sale shall vest in the purchaser a good and valid title to such lands against any claims of every person whatever having claims or title thereto. * * *

"SEC. 16. That a tax of 1-5 of one per cent per pound be, and the same is hereby levied on all lint cotton annually grown in said district and the sum of one fifteenth of one cent per pound is hereby levied upon each and every pound of cotton in the seed raised and grown in said district and not ginned therein, which said tax shall continue until the year 1897, after which time said tax upon cotton may be by resolution of the Board of Mississippi Levee Commissioners repealed and abolished, provided, however, that the tax on cotton shall never be abolished so long as any bonds of said Levee Board which shall

have been issued prior to March 30th, 1892, are outstanding, unless by the written consent of the holders. * * *.

"Sec. 18. The Board of Levee Commissioners may at any time after the year 1892 in cases of any emergency increase the tax on cotton or the ad valorem tax or both, but the tax on cotton shall never be increased beyond one-third of one cent per pound for lint cotton, nor the ad valorem tax increased beyond ten mills. * * *.

"Sec. 28. Railroad taxation for levee purposes shall be and remain as provided by the act of March 12th, 1886, entitled an act for the payment of levee taxes by railroads in the Mississippi Levee District of this State. And said Board shall only be required to make a reduction in railroad taxation, when a reduction is made in the rate of taxation fixed by this bill.

"Approved March 19th, 1896."

Chap. 80, Laws of Mississippi of 1892.

"An Act to authorize and empower the Board of Levee Commissioners for the Yazoo-Mississippi Delta to levy a tax upon all privileges exercised within the said levee district.

"Sec. 1. Be it enacted by the legislature of the State of Mississippi as follows: The Board of Levee Commissioners for the Yazoo-Mississippi Delta be and it is hereby, authorized and empowered to levy a tax upon all privileges exercised, or which may hereafter be exercised, within the limits of said levee district, and to amend, repeal, or change the levy made by them:

but the said privilege taxes shall in no case exceed the taxes levied by the state on the same privileges."

Summing up, the ad valorem tax is general applying to all property in the district as assessed on the county assessment rolls, except only railroad property; the acreage tax is general applying to all land in the district except only railroad land. As shown by the record and stated in the brief for appellee the rate of taxation on the ad valorem basis was for the years in question 4 mills and 5 mills, respectively, and the acreage tax was only 2 cents per acre, a merely nominal amount, having been reduced by the Board of Levee Commissioners. Five mills means ½ of 1 per cent. By taking railroads out of the general tax statute for this levee district and taxing them at the arbitrary rate of $350 per mile the result is that this appellant would have to pay an annual tax which is 35 per cent its assessed value whereas other taxpayers pay only ½ of 1 per cent on the assessed value of theirs, regardless of individual benefit. The other railroad in the district, instead of paying at the rate of 5 mills, or ½ of 1 per cent, on its assessed value, would, if forced to pay $350 per mile, be paying a tax which is 1.2 per cent of its assessed value per annum.

This result could have been achieved in no other way than by placing railroads in a separate class and then taxing them on an arbitrary basis.

The prosperity of the important city of Greenville, in the heart of this levee district, is dependent on the cotton crops raised therein, but it is taxed for levee

purposes at only ½ of 1 per cent of its assessed value plus the nominal amount of two cents per lot. The railroads get some of the business of transporting the cotton (what is left after the trucks and the Government barge line get their share), and all the cities, towns, villages, cotton mills and factories in this district derive their business from the cotton crop; but, the first and most direct beneficiary is the farmer, who raises the cotton. Railroads get no more for hauling this cotton then they do for hauling any other cotton throughout the South.

Respectfully submitted,

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A. F. GARDNER, Jr.,
H. T. ODOM,
Attorneys for Petitioners and Appellants.

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IN THE SUPREME COURT OF THE UNITED STATES

NO. 195

COLUMBUS & GREENVILLE RAILWAY COMPANY, ET AL.,

Petitioners,

VS.

W. J. MILLER, STATE TAX COLLECTOR, FOR THE USE OF THE MISSISSIPPI LEVEE DISTRICT,

Respondent.

BRIEF OF RESPONDENT, W. J. MILLER, STATE TAX COLLECTOR

GEORGE W. BUTLER,
J. ED. FRANKLIN,
LAMAR F. EASTERLING,
SIMON ROSENTHAL,
Attorneys for Respondent.

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In The Supreme Court of The United States

NO. 195

COLUMBUS & GREENVILLE RAILWAY COMPANY, ET AL.,

Petitioners,

VS.

W. J. MILLER, STATE TAX COLLECTOR, FOR THE USE OF THE MISSISSIPPI LEVEE DISTRICT,

Respondent.

BRIEF OF RESPONDENT, W. J. MILLER, STATE TAX COLLECTOR

The petition for writ of certiorari in this case is filed by the Columbus & Greenville Railway Company, a Mississippi corporation, located wholly within the State of Mississippi, petitioning for a review by the Supreme Court of the United States of a decision of the Mississippi Supreme Court declaring a provision of a state statute affecting a local corporation only to be unconstitutional as violating the due process and equal protection laws of the 14th Amendment to the Federal Constitution. Having found that the state statute violated the 14th Amendment to the Federal Constitution, the supreme law, the state court was not required to pass upon the constitutionality of the law as affected by the state constitution.

Before proceeding further with our brief, we think it best at this time to call the attention of this Court to the in-

correct contention made by counsel for petitioners at page 20 of their brief, wherein it is alleged that the Mississippi Supreme Court decided that insofar as the Mississippi Constitution was concerned, the amendment was a valid law. The state Supreme Court did not discuss the validity under the Mississippi Constitution in its opinion.

We, however, call the Court's attention to Section 14 of the Mississippi Constitution:

> "No person shall be deprived of life, liberty, or property except by due process of law."

The "due process" clause of the Federal Constitution and the Mississippi Constitution have the same meaning in matters of this kind. *Rodge vs, Kelly, Tax Collector*, 88 Miss. 209, 40 So. 552; *Hyland, Sheriff, vs. Sharp*, 88 Miss. 567, 41 So. 264. *D'Aguilla vs. Anderson* 120 So. 434, 153 Miss. 549.

STATEMENT OF THE CASE

Under the laws of the State of Mississippi, that part of the state lying and situate in what is known as the Mississippi Delta, comprising all of the state subject to overflow from the waters of the Mississippi and its large tributaries, is required to build, repair and maintain at its own expense the levees located therein. The Delta is divided into two separate and distinct districts, the Mississippi Levee District and the Yazoo-Mississippi Delta Levee District. An attempt was made to divide the two districts in order that each may maintain the particular levees which protected the particular land situated in each district. We

are concerned in this case with the Mississippi Levee District only, comprising the southern half of the Delta.

The state at large pays no money towards the upkeep of the levees and the legislature of the State of Mississippi, except by special act, exercises no supervision over the levee districts. A separate and distinct system of taxation is used in each district to raise the money to build, repair and maintain the levees.

The Mississippi Levee District was incorporated as a political subdivision by an act of the Mississippi legislature, approved November 27th, 1865. Under the original act, the board of commissioners was authorized and empowered to levee a land tax of ten cents per annum on each and every acre of land in the district except school lands, to be designated as the acreage tax, and a uniform tax of one cent per annum on each and every pound of lint cotton raised and gathered in the district, to be designated as the cotton tax. The amount of the tax has been changed from time to time.

By an amendment approved February 21st, 1878, the commissioners were authorized to levy and assess, in addition to the acreage and cotton tax, an ad valorem tax of not more than five mills upon the assessed value of all property, real and personal, lying in the district.

By Chapter 7 of the Act of 1886, the commissioners were authorized and empowered to levy a mileage tax on the railroads in the district. It was about this time that the railroads entered the levee district. The Act of 1886 was

amended by Chapter 125 of the Laws of 1908 so as to read as follows:

"Amendment to law levying taxes on railroad companies for support of levee system.

"Section 1. Be it enacted by the Legislature of the State of Mississippi, That Chapter VII of the Sheet Acts of 1886, be, and the same is hereby amended so as to read as follows:

"That for the purpose of contributing to the expense of building, maintaining and repairing levees in the Mississippi levee district, and of paying the debts and liabilities incurred therefor, by the board of Mississippi levee commissioners, the following tax is hereby levied and assessed upon all railroads and parts of railroads lying and situated in the said levee district, towit: Upon each and every mile of the main or trunk line of all broad or standard gauge railroads, not including sidetracks or switches, the sum of $200 per annum; upon each and every mile of narrow-gauge railroad or railroads of less width than standard gauge, not including sidetracks or switches, the sum of $50 per annum; upon each and every mile of broad or standard gauge railroads, not used and operated as a main or trunk line, but constituting and used as a feeder to a branch of a main or trunk line, or to connect such main or trunk line with some other system, the sum of $120 per annum; provided, that no railroad or branch railroad shall be subject to taxation under this Act while the same is in process of construction, but if any part thereof shall be used for profit, that part so used shall be taxed, although the whole of said railroad or branch may not be finished."

The amended act of 1908 was again amended by Section 1, Chapter 282 of the Mississippi Laws of 1914.

The petitioner and its predecessors paid the taxes under the Act of 1914 without objection. In 1926, the law was again amended by Section 1, Chapter 259, Mississippi Laws of 1926. It is this section which is now before this Court. We quote in full Section 1, Chapter 259, Mississippi Laws of 1926:

> "That for the purpose of contributing to the expense of building, maintaining and repairing levees in the Mississippi levee district, and of paying the debts and liabilities incurred thereof, by the board of Mississippi levee commissioners, the following tax is hereby levied and assessed upon all railroads and parts of railroads lying and situated in the said levee district, to-wit: Upon each and every mile of the main or trunk line of all broad or standard gauge railroads, not including side tracks or switches, the sum of $350.00 per annum; upon each and every mile of narrow gauge railroad or railroads of less width than standard gauge, not including side tracks or switches, the sum of $87.50 per annum; and upon each and every mile of broad or standard gauge railroads, not used and operated as a main or trunk line, but constituting and used as a feeder to or a branch of a main or trunk line, or to connect such main or trunk line with some other system, the sum of $210.00 per annum; provided, that no railroad or branch railroad shall be subject to taxation, under this act while the same is in process of construction, but if any part thereof shall be used for profit, that part so used shall be taxed, al-

though the whole of said railroad or branch may not be finished; *provided further that the tax per mile per annum on the main line of any railroad company which does not own in excess of twenty-five miles of railroad in the Mississippi levee district shall be* $50.00 *per annum.*" (Italics ours)

By omitting the part of the Act of 1926, which is shown in italics, we have the full text of the Act of 1914. It is the Amendment of 1926, shown in italics, that was declared unconstitutional by the Mississippi Supreme Court. The Mississippi Levee District is therefore maintained at the present time by four schemes or systems of taxation, to-wit:

(1) An acreage tax of two cents per acre on each and every acre of land in this district.

(2) A cotton tax on every pound of lint cotton raised and gathered in the levee district.

(3) An ad valorem tax upon all property in the district, real and personal.

(4) A mileage tax on railroads.

In 1890, the State of Mississippi adopted its present constitution, and said constitution provides as follows:

"Article 11. Levees.

"Section 227. A levee system shall be maintained in the state as provided in this article.

* * * *

"Section 236. The legislature shall impose for levee purposes, in addition to the levee taxes heretofore levied or authorized by law, a uniform tax of not less than two nor more than five cents an

acre per annum upon every acre of land now or hereafter embraced within the limits of either or both of said levee districts. The taxes so derived shall be paid into the treasury of the levee board of the district in which the land charged with the same is situated; and the legislature, by the act imposing said tax, shall authorize said levee boards to fix the annual rate of taxation per acre within the limits aforesaid, and thereby require said levee boards, whenever a reduction is made by them in their other taxes, to make a proportionate reduction in the acreage tax hereinbefore mentioned; but said acreage tax shall not be reduced below two cents an acre per annum; and all reductions in such taxation shall be uniform in each of said districts; but the rate of taxation need not be the same in both of them; and such specific taxes shall be assessed on the same assessment roll, and collected under the same penalties, as the ad valorem taxes for levee purposes, and shall be paid at the same time with the latter. And no levee board shall ever be permitted to buy lands when sold for taxes; but the state shall have a prior lien for the taxes due thereto. The legislature may provide for the discontinuance of the tax on cotton, but not in such manner as to affect outtsanding bonds based on it, and on the discontinuance of the tax on cotton, shall impose another tax in lieu thereof; but the legislature may repeal the acreage tax required to be levied hereby after the first day of January, A. D. 1895.

"Section 237. The legislature shall have full power to provide such system of taxation for said levee districts as it shall, from time to time, deem wise and proper.

> "Section 238. No property situated between the levee and the Mississippi river shall be taxed for levee purposes, nor shall damage be paid to any owner of land so situated because of its being left outside a levee."

The proviso or amendment of 1926 is so clearly contrary to the spirit and letter of both the Constitution of the United States and of the State of Mississippi that the State Tax Collector decided to ignore said proviso and demanded of the Columbus & Greenville Railway Company that it pay the tax on the same basis as the other railroads of the same class in the district.

The State Tax Collector charged that the provision contained in said Section 1, Chapter 259, Laws of 1926, that,

> "Provided further that the tax per mile per annum on the main line of any railroad company which does not own in excess of twenty-five miles of railroad in the Mississippi levee district shall be $50.00 per annum."

is unconstitutional because it violates the 14th Amendment to the Federal Constitution in that it denies to the other railroads in the district the equal protection of the law, and takes their property without due process of law, and that it violates the "due process" and "uniformity and equality clauses" of the Mississippi Constitution (Sec. 14, see page 2 of brief,) and Section 236, which requires that "All reductions in such taxation shall be uniform in each of said districts", (page 6), referring in the latter section to the levee districts. It was also contended by the State Tax Collector that the law failed to comply with the mandatory

provisions of Section 234 of the constitution, which requires that all revenue laws dealing with taxes in the levee district be published in a newspaper in said district. (See Appendix for full text of Sections 112 and 234.)

At the first trial, the Circuit Court of Montgomery County, Mississippi, sustained a demurrer to the declaration and the State Tax Collector appealed to the Supreme Court of the State. The Supreme Court reversed and remanded the case, and we quote the pertinent part of the opinion: (154 Miss. 314, 122 So. 366)

> "Smith, C. J. The defendant owns and oprates a railroad, 18.41 miles of which lie in the Mississippi levee district, and this suit is to recover from it the sum of $12,150.60, levee taxes alleged to be due by it for the years 1296 and 1927, and statutory damages thereon. A demurrer to the tax collector's declaration was sustained in the court below, and his suit dismissed.
>
> "Chapter 7, Laws of 1886, imposed a levee tax on railroads in the Mississippi levee district of $100 per annum on each mile of the main line thereof in the district. This statute was amended by chapter 282, Laws of 1914, so as to impose a tax of $350 per annum upon each mile of the main line of railroads in the district. By Chapter 259, Laws of 1926, the 1914 statute was amended by adding thereto the following: 'Provided, further, that the tax per mile per annum on the main line of any railroad company which does not own in excess of 25 miles of railroad in the Mississippi levee district shall be $50.00 per annum'.
>
> "The appellee paid $50 per mile on its 18.41 miles of railroad in the district for the years

1926-1927, and this suit is to recover the difference between that amount and $350.00 per mile and damages thereon. The appellant's contentions are: That chapter 259, Laws of 1926, is void, and that consequently chapter 282 of the Laws of 1914 remains in full force and effect; but, if mistaken in this, that the proviso in chapter 259, Laws of 1926, is void.

"(1) Chapter 259, Laws of 1926, divides railroads into two classes: First, railroads having not more than 25 miles of railroad in the levee district; and, second, all other railroads therein. The ground of the appellant's contention is that this classification has no reasonable relation to the purpose for which the statute was enacted, but is arbitrary and unreasonable, and therefore in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution. This is so manifestly correct that the citation of authorities therefor would be supererogatory. It will not be necessary for us to decide whether this results simply in the proviso of chapter 259, Laws of 1926, being void, or in the whole statute being void, for in either event the tax which the appellee will have to pay will be the same; that is, $350 per annum on each mile of its railroad in the levee district."

On the second trial, the Circuit Court rendered judgment against the Columbus & Greenville Railway Company on the basis of $350.00 per mile. From this decision the railroad appealed and the Supreme Court affirmed the decision in the Circuit Court and rendered the following opinion:

"Smith, C. J. This case is ruled by the opinion rendered on the former appeal herein (154 Miss. 317, 122 So. 366), to which we adhere; and the evidence excluded, if competent, as to which we express no opinion, could not have changed the result.

"Affirmed."

It is from this latter decision that the petition for writ of certiorari is filed.

ARGUMENT

LEVEE TAXES A BENEFIT TAX.

The purpose of the act as recited in the preamble thereof is as follows:

> "That for the purpose of contributing to the expenses of building, maintaining and repairing levees in the Mississippi levee district, and of paying the debts and liabilities incurred therof, by the board of Mississippi levee commissioners, the following tax is hereby levied and assessed upon all railroads and parts of railroads lying and situated in the said levee district, to-wit:"

Section 238 of the Mississippi Constitution provides that:

> "No property situated between the levee and the Mississippi river shall be taxed for levee purposes* * * * *";

It being the intention and purpose that only property receiving any benefits from the levees shall be taxed for their maintenance.

It follows, therefore, that all taxation for said district must necessarily be based upon and governed by the standard of benefit, and all classification shall be based upon and bear a reasonable and just relationship in respect to such benefit.

Adams vs. Standard Oil Company, 97 Miss. 879, 53 So. 692.

Chi. & St. Paul Railway Co. vs. Westby, 178 Fed. 619.

Southern Ry. Co. vs. Green, 216 U. S. 400, 30 Sup. Ct. 287.

Magoun vs. Bank, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. ed 1037.

Milken vs. Moffat Tunnel Imp. Dist., 262 S. 710, 43 Sup. Ct. 204.

Myles Salt Co. vs. Iberia, etc., 239 U. S. 478, 60 L. ed. 392.

Gulf C. & S. F. R. R. Co. vs. Ellis, 165 U. S. 150, 17 Sup. Ct. 25, 41 L. ed. 666.

Voight vs. Detroit, 184 U. S. 115, 22 Sup. Ct. 337; 46 L. ed. 459.

The General Rule As To Classification

The classification of property for taxes must have some basis, reasonable or unreasonable, other than mere accident,

whim or caprice. There must be some support of taste, policy, difference of situation or the like, or some reason for it, even if it is a poor one. If the classification results in an arbitrary and oppressive discrimination in regard to a class of citizens or a species of property, it contravenes the equal protection guaranty of the Federal Constitution. Such classification should treat all in the same class alike, and should not impose a heavier burden upon one than upon another of the same class, size, situation and value. The classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.

Cotting vs. Godard, 183 U. S. 79, 46 L. ed. 92.

Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32, 48 Sup. Ct. 423, 72 L. ed. 770.

Connolly vs. Union Sewer Pipe Co., 184 U. S. 540, 22 Sup. Ct. 431.

People vs. Mensching, 187 N. Y. 8, 10 Ann. Cas. 101.

Fiscal Court vs. F. & A. Cox Co. (*Ky*), 117 S. W. 296, 21 L. R. A. (N. S.) 83.

A. & P. Tea Co. vs. Doughton, 144 S. E. 701, 196 N. C. 145.

Fountain Park Co. vs. Hensler (Ind.), 155 N. E. 465, 50 A. L. R. 1518.

Detroit R. R. Co. vs. Fuller, 205 Fed. 86.

Nashville, etc., R. R. Co. vs. Taylor, 86 Fed. 168.

Vicksburg vs. Mulane, 106 Miss. 199, 63 So. 412.

Adams vs. Standard Oil Co., 97 Miss. 879, 53 So. 692.

Hyland, Sheriff, vs. Sharp, 41 So. 264, 88 Miss. 567. 12 C. J. 1152.

State vs. Banner Cleaners & Dyers, Inc., 127 So. 370, 170 La._____.

Southern Ry. Co. vs. Green, 216 U. S. 400, 30 Sup. Ct. 287.

In determining whether a state taxing law contravenes rights secured by the Federal Constitution the decision must depend "not upon any mere questions of form, construction or definition, but upon the practical operation and effect of the tax imposed".

Cooley, Law of Taxation, 4th. Ed., Vol. I, page 313.

Schaeffer vs. Carter, 252 U. S. 37, 64 L. Ed. 445, 40 Sup. Ct. Rep. 221.

The Practical Operation and Effect of the Tax in This Case.

The practical operation and effect of the amendment of 1926 is to exempt the Columbus & Greenville Railway Company from its proper proportion of the tax, and to impose an arbitrary and unreasonable proportion upon the

Yazoo & Mississippi Valley Railroad Company, and favors a Mississippi corporation located wholly within the state over a foreign corporation located partly within and partly without the state. It amounts to an abritrary and oppressive discrimination between two similar species of property and between two persons of the same class and situation.

The classification in the case at bar is based solely upon a mileage basis. The value of the railroad property, the business done, the gross earnings, the direction of the railroad, its closeness to the river, or even the number of years in operation are not taken into consideration. Were this a statute dealing with the rates, there would be a slender chance of same being upheld. But as heretofore stated, the tax must be based upon the benefits accruing to the taxpayer or its property by virtue of the erection and maintenance of said levees.

What is the effect of the classification in this case?

All main line railroads over twenty-five miles in length pay $350.00 per mile, and all main line railroads under twenty-five miles pay $50.00 per mile. On the other hand, a narrow gauge railroad, without respect to the number of miles, pays $87.50 per mile, and a branch line, with out respect to the length thereof, pays $210.00 per mile, a classification so unreasonable that the Honorable Chief Justice of the Mississippi Supreme Court said that the citation of authorities was unnecessary to support an opinion declaring the same unconstitutional.

Counsel for petitioner continually called the tax a graduated tax. This is incorrect, as the tax is not a graduated one. To be classified as a graduate tax, it should have

provided that a railroad shall pay $50.00 on the first twenty-five miles and $350.00 on each mile in excess thereof. But in its zeal to favor the intrastate road, the legislature has required the Yazoo & Mississippi Valley Railroad Company to pay the large sum of $350.00 on its first mile and on each and every mile.

Under this classification a main line railroad twenty-six miles in length pays $8100.00 and a main line railroad twenty-four miles in length pays only $1200.00. The petitioner operates eighteen miles in the district and is the only railroad operating less than twenty-five miles in the district.

Counsel for petitioner, at page 22 of the brief, have attempted to classify the railroads under the statute. In making this classification, counsel makes a mistake that changes the entire complex of the case at bar. Counsel states that the special tax of $50.00 on railroads applies to all railroads, main line, narrow gauge and branch lines, less than twenty-five miles in length. This classification is incorrect, as the proviso *applies only to main lines*, being placed in the law, as admitted by counsel for petitioner, for the sole benefit of petitioner. We must therefore strike out the phrase in classes 2 and 3 given by counsel of "less than twenty-five miles." The effect of the correct classification is as follows:

Class 1. A main or trunk line standard gauge railroad, exclusive of side tracks and switches, pays on each and every mile, $350.00, or if twenty-five miles long, it pays $8100.00.

Class 2. A narrow gauge railroad, less than standard, exclusive of side tracks and switches, pays on each and every mile, $87.50, or for eighteen miles, $1575.00.

Class 3. Upon each feeder or branch of a main line or trunk line, $210.00 on each and every mile, or for eighteen miles, $3780.00.

Class 4. Main line railroad operating not in excess of twenty-five miles in the district pays $50.00 on each and every mile, or for eighten miles, $900.00.

The petitioner operates eighteen miles in the district, and is the only railroad in Class 4.

The photostatic map of railroad mileage in the record shows the Columbus & Greenville Railroad Company runs from Greenville through Leland, *or east and west*, a distance of 18.41 miles.

The Yazoo & Mississippi Valley Railroad Company, the other main line in the district, has two branches therein, one running from Rosedale to Cleveland, *east and west*, a distance of 28.21 miles, and one from Kelso to Holly Bluff, *east and west*, a distance of 15.99 miles.

Yet the Yazoo & Mississippi Valley Railroad Company pays $210.00 per mile on said *branch* lines and the Columbus & Greenville Railway Company pays only $50.00 on its *main* line. The gross inequality of the act is seen by the fact that on the branch from Kelso to Holly Bluff, which is shorter by three miles and runs in the same direction, the Yazoo & Mississippi Valley Railroad Company pays four

times as much tax as the gross tax of the Columbus & Greenville Railway Company. The main line of the Columbus & Greenville Railway Company is much closer to the break of 1927 and suffered greater damage from said flood.

Even a lumber company operating a narrow gauge railroad running from its mill to its lumber tract pays a greater tax per mile on said road than the petitioner.

Let us view this tax from the viewpoint of the other forms of taxation in the district.

There is levied an acreage tax of two cents per acre on land in the district. Suppose the tax was changed so as to read that a tax of one cent per acre is levied on all farms of twenty-five acres or less, and a tax of four cents per acre is levied on all farms of over twenty-five acres. Being a benefit tax, could same possibly be upheld? We think not. A tax of one dollar per bale is levied on all lint cotton raised and gathered in the district. Were the tax changed to provide that a tax of fifty cents per bale must be paid by all farmers raising one hundred bales of cotton or less, and a tax of two dollars per bale paid by all farmers raising more than one hundred bales, could same possibly be held constitutional? We think not. The benefit to each and every acre of land in the district and the corresponding benefit to each and every bale of cotton from the protection afforded by the levees is the same. The benefit to each and every mile of main line or standard gauge railroad in the district is identically the same.

> "It must appear not only that a classification has been made, but also that it is one based upon

> some reasonable grounds—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection, and there can be no discrimination between subjects which properly belong to the same class. The right of classification is allowed in order to avoid or correct inequalities, never to create them." 26 R. C. L., Taxation, Sec. 216 and authorities above cited.

The effect and operation of the tax herein levied is to impose a gigantic tax in the aggregate on the Yazoo & Mississippi Valley Railroad Company, and on the other hand, to require the petitioner, Columbus & Greenville Railway Company, to pay only a nominal tax in proportion. This tax certainly bears no reasonable relationship to the purpose of the tax, which, as heretofore stated, is based solely upon the benefits of levee protection.

Examples of Unconstitutional Classifications.

As stated in the opinion of the Court:

> "The ground of the appellant's contention is that this classification has no reasonable relation to the purpose for which the statute was enacted, but is arbitrary and unreasonable, and therefore in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution. This is so manifestly correct that the citation of authorities therefor would be supererogatory."

We shall, however, discuss a few authorities in support of our contention.

Cotting vs. Godard, 183 U. S. 49, 46 L. ed. 92.

The State of Kansas enacted a law regulating rates for stockyards in the state and providing that said law should apply only to those receiving over one hundred head of cattle per day. This Court, speaking through Mr. Justice Brewer, held the same unconstitutional, and we quote from the opinion:

> "But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other. There can be no pretense that a stock yard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, and the only difference is that one does more business than the other. But the receipt of an extra 2 head of cattle per day does not change the character of the business. If once the door is opened to the affirmance of the proposition that a state may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guaranty of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron referred to in the quotation above made. This statute is not simply leg-

islation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but it is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would. We think, therefore, that the principle of the decision of the supreme Court of Kansas in *State v. Haun*, 61 Kan. 146, 47 L. R. A. 369, 59 Pac. 340, is not only sound, but is controlling in this case, and that the statute must be held unconstitutional as in conflict with the equal protection clause of the 14th Amendment."

Louisville Gas & Electric Co. vs. Coleman, 277 U. S. 32, 48 Sup. Ct. Rep. 423, 72 L. ed. 770.

A Kentucky statute taxing the recording of mortgages running more than five years and exempting from the tax those which matured within five years or less was held to violate the equal protection clause of the Federal Constitution as arbitrary classification:

"Here it seems clear that a circumstance which affects only taxable values has been made the basis of a classification under which one is compelled to pay a tax for the enjoyment of a necessary privilege which, aside from the amount of the recording fee which is paid by each, is furnished to another as a pure gratuity. Such a classification is arbitrary. It bears no reasonable or

just relation to the intended result of the legislation. The difference relied upon is no more substantial, as the sole basis for the present classification, than a difference in value between two similar pieces of land would be invoked as the sole basis for a like classification in respect to such property. Certainly one who is secured by the state in the priority of his lien for a period less than five years enjoys a privilege which in kind and character fairly cannot be distinguished from one who enjoys a like privilege for a longer period of time. The former reasonably may be required to pay proportionately less than the latter; but to exact, as the price of a privilege which, for obvious reasons, neither safely can forego, a tax from the latter not imposed in any degree upon the former, produces an obvious and gross inequality. If the state, upon the same classification, had reversed the process and taxed indebtedness maturing within a shorter period than five years, and exempted such as matured in a longer period, the inequality probably would be readily conceded, but the constitutional infirmity, though more strikingly apparent, would have been the same."

People ex rel Farrington vs. Mensching, 187 N. Y. 8 10 Ann. Cas. 101:

A New York statute taxing stock certificates was involved in this case, and we quote the following clear-cut illustration from the opinion:

"Even if a tax on farms according to acreage might be sustained, it is obvious that a tax on farms according to the number of fields into which they are divided would not be valid. Such a classi-

fication would not treat all in the same class alike, and would impose a heavier burden upon one farm than upon another of the same size, situation, and value. A statute imposing such a tax would not give 'that equal protection and security' to which all, under like circumstances, are entitled 'in the enjoyment of their personal and civil rights.' *Barbier vs. Connolly*, 115 U. S. 27, 5 U. S. Sup. Ct. Rep. 357; *Matter of Jacobs*, 98 N. Y. 98; *People* vs. Marx, 99 N. Y. 377, 2 N. E. Rep. 29."

Fiscal Court of Owen County vs. F. & A. Cox Company, 117 S. W. 269, 21 L. R. A. (N. S.) 83:

The Kentucky statute placed a tax of seventy-five dollars on each three horse wagon operated for business, and a tax of two hundred dollars on each four horse wagon operated for business. The tax, being such an arbitrary discrimination and distinction, was held void.

"Furthermore, the order itself shows that the owner of a four-horse wagon is required to pay three times as much tax as the man who operates a three-horse wagon, when there is nothing in the character of the wagons to justify such inequality. It may be conceded that a reasonable classification for the purpose of license taxes may always be made. Classification based upon the character of the vehicles and the number of horses used in connection with them may be proper (*Smith v. Louisville*, 9 Ky. L. Rep. 779, 6 S. W. 911), but the classification sought to be made in this case is manifestly unequal and unreasonable. It cannot be said to be reasonable because it bears alike upon all owners of four-horse wagons. The class of persons whose occupations are taxed are

those who run and operate vehicles for hire. The taxing power may subdivide this class, but it cannot unjustly discriminate between the subdivisions so made. As the order in question unjustly discriminates between the owners of three-horse vehicles and the owners of four-horse wagons, it follows that the license fee of $200, imposed upon four-horse wagons, is therefore void. *Livingston v. Paducah*, 80 Ky. 656; 1, *Dill. Mun Corp.* 323; *Simrall v. Cavington*, 90 Ky. 444, 9 L. R. A. 556, 29 Am. St. Rep. 398, 14 S. W. 369; *Cooley, Tax.* 127; *Hager v. Walker*, supra."

Fountain Park Company v. George Hensler, et al (Ind), 155 N. E. 465, 50 A. L. R. 1518.

"In the case at bar all chautauqua companies, which, as such, possess common attributes and stand in like situation with relation to any public necessity that might exist for their obtaining a site, are split up, and a subclass—a very small subclass of such companies, to-wit, those which have existed and conducted meetings for sixteen days a year continuously for fifteen years, and which have held a lease for all of said period on a tract of timberland—has been singled out as the recipient of the benefits conferred by the statute.

* * * * * * * *

"We can see no necessity for, nor propriety of, different legislation for a chautauqua company that has operated sixteen days a year for fifteen years, than for one which has operated fourteen days a year for five years; for a chautauqua company that has operated on a leased track of woodland for fifteen years, than for one which operates in a city park or in a school yard or which

owns a piece of prairie land. Such differences are not germane to the purpose of the law, which is to grant the right of eminent domain to chautauqua companies. Leases and timberlands are merely property incidents and are not reasonable or natural differences upon which to base the legislative classification. The attempted classification does not embrace all those possessing the common attributes of the appellant company, and we believe it is capricious and arbitrary, can serve only to identify and not to classify, and that the act therefore is invalid."

A. & P. Tea Company v. Doughton, 144 S. E. 701, 196 N. C. 145.

A statute imposing a license tax for revenue purposes on each store of chain store establishment having over six stores was held in this case to violate the equal protection clause of the Constitution.

The Mississippi Supreme Court, in the case of *Adams vs. Standard Oil Company*, 97 Miss. 879, 53 So. 692, laid down the following general principle as to classification:

"What are the limits of the power of classification by the states under this constitutional provision? It is undoubted that the power of the states to make classification of persons and property for the purpose of taxation, as well as for other purposes, is broad; but it is equally true that the mere fact of classification is not sufficient to relieve a statute from the operation of the equality clause. The classification must be based on some reasonable ground, and some real difference which

> bears a just and proper relation to the object sought to be accomplished. 'Mere arbitrary selection can never be justified by calling it classification,' and discriminations against persons and classes of an unusual character are obnoxious to the Constitution. 4 Encyc. U. S. Sup. Ct. Rep. 362, 363:"

Hyland, Sheriff, vs. Sharp, 88 Miss. 567, 41 So. 264.

The court had under review a privilege tax on those doing a money lending business on personal security, such as household furniture, wearing apparel, etc., and the amount of the tax was based on the kind of security. The tax was declared unconstitutional by the Mississippi Supreme Court as being class legislation and on the ground that,

> "All in the class are not dealt with alike * * * * * The tax in this case is not imposed on all money lenders, graduating the tax according to the population of the town or the amount of the loans, etc. It attempts, arbitrarily, to base the tax upon the kinds of securities. * * * * A law depriving the citizen of his property without due process of law."

We could quote and cite a long line of authorities similar to those herein cited. We have attempted to pick out a few decisions which we think support the decision of the Mississippi Supreme Court.

Judgment Based Upon Act of 1926. Same Statute May Be Constitutional in Part and Unconstitutional in Part.

The inconsistency of the petitioner's position in this case is glaring. Petitioner comes here by petition for writ of certiorari for the purpose of sustaining the validity of Section 1, Chapter 259, Laws of 1926. In the same case, petitioner has prosecuted a direct appeal for the purpose of having Section 1, Chapter 282, Laws of 1914, declared unconstitutional. Yet, as heretofore stated (page 6) the law of 1926 is identical with the law of 1914, except for the proviso which exempts from its provisions a railroad whose main line is less than twenty-five miles in length in the district from the $350.00 tax per mile and places a special tax of $50.00 per mile thereon.

How counsel can maintain that the classification contained in the Act of 1914 is unconstitutional and at the same time maintain that the classification in the Act of 1926 is constitutional is beyond our understanding.

We again call the Court's attention to another inaccurate statement contained in the brief for petitioner (paragraph 2, page 10, paragraph 4, page 17, and page 20) wherein it is asserted that the Supreme Court of the State of Mississippi declared the entire Act of 1926 null and void and reinstated the Act of 1914. With the proviso complained of stricken out, the Act of 1926, as hereinbefore stated, became and was in fact the Act of 1914, and the Mississippi Supreme Court therefore held.

"* * * * It will not be necessary for us to decide whether this results simply in the proviso of chapter 259, Laws of 1926, being void, or in the whole statute being void, for in either event the tax which the appellant will have to pay will be the same; that is, $350.00 per annum on each mile of its railroad in the levee district.

"For, if the statute should be held void, chapter 282, Laws of 1914, would remain in full force and effect, under which the complaining railroad's tax would be $350 per mile, the exact amount imposed by chapter 259, Laws of 1926; or, if the proviso only of chapter 259, Laws of 1926, is void, the same result would follow."

It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that part which is unconstitutional may be stricken out and rejected and the valid part of the statute retained.

6 R. C. L. 121.

Allen vs. Louisiana, 103 U. S. 80, 26 L. ed. 318.

Adams vs. Standard Oil Co., 97 Miss. 879, 53 So. 692.

Ballard vs. Miss. Cotton Oil Co., 81 Miss. 507, 34 So. 533, 95 A. S. R. 476.

6 R. C. L. 121.

"It is a fundamental principle that a statute may be constitutional in one part and unconstitutional in another part, and that if the invalid part is severable from the rest the portion which is constitutional may stand while that which is un-

constitutional is stricken out and rejected; but where it is not possible to separate that which is unconstitutional from the rest of the act, then the whole statute falls. If after eliminating the invalid portions, the remaining provisions are sufficient to be operative and accomplish their proper purpose, it does not necessarily follow that the whole act is void. The constitutional and unconstitutional parts should be severable so that the valid portion may be read and may stand by itself. In determining the question whether the parts of a statute are severable within the meaning of this principle, the court acts by inspection of the statute. The constitutional and unconstitutional provisions of a statute may be included in one and the same section and yet be separable, so that some stand while others fall." 6 R. C. L. 121.

Allen vs. Louisiana, 103 U. S. 80.

"It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected.

* * * * * * *

Adams vs. Standard Oil Co., 97 Miss. 879, 53 So. 692.

"In treating this question, Judge Cooley, in his work on Constitutional Limitations (7th Ed.) pp. 246, 247, 248, says: 'Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be

presumed the Legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand, though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial, but whether they are essentially and inseparably connected in substance.' If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained."

SUMMARY.

The petition and brief of the petitioner, Columbus & Greenville Railway Company, fails to substantiate the contentions of the petitioner that the decision of the Supreme Court of Mississippi is erroneous. The opinion is supported by a long line of well reasoned cases from this Court and from the Mississippi Supreme Court.

The decision of the state court holding that the Act of 1926, insofar as the same discrimniated between main line railroads less than twenty-five miles in length in the levee district, and main line railroads in excess of twenty-five miles, violated the 14th Amendment to the Constitution of the United States, and the "due process" and the "uniformity and equality" clauses of the Mississippi Constitution. The tax being levied and assessed solely for the purpose of building, repairing and maintaining levees and for

protection from overflow, the provision of the law favoring in its intent and purpose the domestic railroad located wholly within the state is unreasonable and arbitrary, and bears no relationship to the purpose of the tax, and is a palpable, whimsical and arbitrary discrimination between two similar species of property and between two persons of the same class in the same situation.

We respectfully submit that there is no probable error in this cause and that the petition for writ of certiorari should be denied.

Respectfully submitted,

GEORGE W. BUTLER,
J. ED FRANKLIN,
LAMAR F. EASTERLING,
SIMON ROSENTHAL,
Attorneys for Respondent.

APPENDIX

Section 112, Mississippi Constitution 1890.

"Taxation shall be uniform and equal throughout the state. Property shall be taxed in proportion to its value. The legislature may, however, impose a tax per capita upon such domestic animals as from their nature and habits are destructive of other property. Property shall be assessed for taxes under general laws, and by uniform rules, according to its value. But the legislature may provide for a

special mode of valuation and assessment for railroads, and railroad and other corporate property, or for particular species of property belonging to persons, corporations, or associations not situated wholly in one county. But all such property shall be assessed at its true value, and no county shall be denied the right to levy county and special taxes upon such assessment as in other cases of property situated and assessed in the county.

Section 234, Article 11, Levees, Mississippi Constitution 1890.

"No bill changing the boundaries of the district, or affecting the taxation or revenue of the Yazoo Mississippi Delta Levee District, or the Mississippi Levee District, shall be considered by the legislature unless said bill shall have been published in some newspaper in the county in which is situated the domicile of the board of levee commissioners of the levee district to be affected thereby, for four weeks prior to the introduction thereof in the legislature; and no such bill shall be considerd for final passage by either the senate or house of representatives, unless the same shall have been referred to, and reported on, by an appropriate committee of each house in which the same may be pending; and no such committee shall consider or report on any such bill unless publication thereof shall have been made as aforesaid.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1930

NO. 195

COLUMBUS & GREENVILLE RAILWAY COMPANY, ET AL.,

Appellant,

VS.

W. J. MILLER, STATE TAX COLLECTOR, FOR THE USE OF THE MISSISSIPPI LEVEE DISTRICT,

Appellee.

Motion to Affirm State Court Decision and Dismiss Appeal and Brief of Appellee in Suport of Motion.

GEORGE BUTLER,
J. ED. FRANKLIN,
LAMAR F. EASTERLING,
SIMON ROSENTHAL,
C. B. SNOW,
Attorneys for Appellee.

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W. J. MILLER, STATE TAX COLLECTOR, FOR THE USE OF THE MISSISSIPPI LEVEE DISTRICT,

Appellee.

Motion to Affirm State Court Decision and Dismiss Appeal.

Comes now W. J. Miller, State Tax Collector, for the use of the Mississippi Levee District, appellee in the above entitled cause, by his counsel of record, and moves the Court to affirm the decision of the Supreme Court of the State of Mississippi and dismiss the appeal herein, as the appeal presents no question on which the decision of the case depends. The validity of Section 1, Chapter 282, Laws of Mississippi of 1914, is not necessary to a final decision herein.

Respectfully submitted,

GEORGE BUTLER,
J. ED. FRANKLIN,
LAMAR F. EASTERLING,
SIMON ROSENTHAL,
C. B. SNOW,
Attorneys for Appellee.

In The Supreme Court of The United States

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NO. 195

COLUMBUS & GREENVILLE RAILWAY COMPANY, ET AL.,

Appellant,

VS.

W. J. MILLER, STATE TAX COLLECTOR, FOR THE USE OF THE MISSISSIPPI LEVEE DISTRICT,

Appellee.

Brief of Appellee in Support of Motion to Affirm State Court Decision and Dismiss Appeal.

The Supreme Court of the State of Mississippi affirmed the judgment of the Circuit Court of Montgomery County, Mississippi, by decree entered April 21, 1930. From this decree the Columbus & Greenville Railway Company and the sureties on its appeal bond in the state court have prosecuted a direct appeal to the Supreme Court of the United States and have also filed a petition for writ of certiorari.

The Supreme Court of the State of Mississippi held the following provision:

"* * * * * Provided further that the tax per mile per annum on the main line of any railroad

company which does not own in excess of twenty-five miles of railroad in the Mississippi levee district shall be $50.00 per annum."

of Section 1, Chapter 259, Mississippi Laws of 1926, to violate the 14th Amendment of the Federal Constitution.

It upheld as valid the remainder of Section 1, Chapter 259, Mississippi Laws of 1926, and assessed the Columbus & Greenville Railway Company with a tax of $350.00 per mile.

Section 1, Chapter 259, Mississippi Laws of 1926, is as follows:

> "That for the purpose of contributing to the expense of building, maintaining and repairing levees in the Mississippi levee district, and of paying the debts and liabilities incurred thereof, by the Board of Mississippi Levee Commissioners, the following tax is hereby levied and assessed upon all railroads and parts of railroads lying and situated in the said levee district, to-wit: Upon each and every mile of the main or trunk line of all broad or standard guage railroads, not including side-tracks or switches, the sum of $350.00 per annum; upon each and every mile of narrow guage railroad or railroads of less than standard gauge, not including side tracks or switches, the sum of $87.50 per annum; and upon each and every mile of broad or standard gauge railroads, not used and operated as a main or trunk line, but constituting and used as a feeder or a branch of a main or trunk line, or to connect such main or trunk line with some other system, the sum of $210.00 per annum; provided, that no railroad or

branch railroad shall be subject to taxation, under this act while the same is in process of construction, but if any part hereof shall be used for profit, that part so used shall be taxed, although the whole of said railroad or branch may not be finished; *provided further that the tax per mile per annum on the main line of any railroad company which does not own in excess of twenty-five miles of railroad in the Mississippi levee district shall be* $50.00 *per annum.*" (Italics ours.)

The part of the law in italics is the proviso declared unconstitutional. The Act of 1926 amends Section 1, Chapter 282, Mississippi Laws of 1914. By omitting the part of the Act of 1926 shown in italics, we have the text of the Act of 1914.

The direct appeal prosecuted by the Columbus & Greenville Railway Company herein is for the purpose of having Section 1, Chapter 282, Mississippi Laws of 1914, declared null and void as violative of the Constitution of the United States.

Appellants have filed a brief in support of their petition for writ of certiorari and we have replied to said brief. The appellants have filed a reply to our brief. Said briefs in our opinion cover in full the law on this matter and we respectfully refer the Court to the briefs already on file.

We quote the part of the opinion of the state court dealing with the matters upon which a direct appeal is based:

"(1) Chapter 259, Laws of 1926, divides railroads into two classes: First, railroads having

not more than 25 miles of railroad in the levee district; and, second, all other railroads therein. The ground of the appellant's contention is that this classification has no reasonable relation to the purpose for which the statute was enacted, but is arbitrary and unreasonable, and therefore in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution. This is so manifestly correct that the citation of authorities therefor would be supererogatory. It will not be necessary for us to decide whether this results simply in the proviso of chapter 259, Laws of 1926, being void, or in the whole statute being void, for in either event the tax which the appellee will have to pay will be the same; that is, $350 per annum on each mile of its railroad in the levee district.

* * * * * * *

"In the event a railroad discriminated against by this statute should challenge the validity thereof on the ground that it is arbitrarily discrimniated against, it would not be necessary for the court to decide the question, for to do would profit the complaining railroad nothing; for, if the statute should be held void, chapter 282, Laws of 1914, would remain in full force and effect, under which the complaining railroad's tax would be $350 per mile, the exact amount imposed by chapter 259, Laws of 1926; or, if the priviso only of chapter 259, Laws of 1926, is void, the same result would follow. This rule seems not to have been called to the attention of this court, and was overlooked by it, in the case of *City of Jackson v. Mississippi Fire Insurance Co.*, 132 Miss. 415, 96 So. 345."

The appeal in this matter is apparently based upon the fourth assignment of error, as shown at page 64 of the record, which is as follows:

> "(4) The Supreme Court of the State of Mississippi committed error in holding that Chapter 282 of the Mississippi Laws of 1914 was valid over and against the objections of the Columbus & Greenville Railway (Railroad) Company that said Chapter 282, Mississippi Laws of 1914, as applied and enforced in this case, violated the Fourteenth Amendment to the Constitution of the United States, in that the same deprived the said Columbus & Greenville Railway (Railroad) Company of its property without due process of law and denied to it the equal protection of the law."

We are unable to gather from the statement of jurisdiction filed by the appellee just what the appeal is based upon. However, we gather that they have taken a direct appeal on the ground that the court reinstated the Act of 1914. See page 7 of the statement. With the exception of the validity of the Act of 1914, all questions involved in this case are presented by the petition for writ of certiorari.

We have discussed the matters herein presented, as above stated, in our brief filed in answer to the petition for writ of certiorari, and we insert in the appendix herein that portion of the brief dealing with the question now presented.

We can adopt the brief of the appellant filed in this cause in support of its petition for writ of certiorari as a

brief in support of this motion. If the authorities cited in said brief can support the full text of the Act of 1926, then even more strongly can they be cited to support the Act of 1914 and the Act of 1926, without the proviso as to railroads less than 25 miles in length.

We respectfully submit that the judgment of the Supreme Court of the State of Mississippi in this matter should be affirmed and the appeal of the Columbus & Greenville Railway Company, et al., to this Court should be dismissed and the appellants assessed with damages as provided by the rules of this Court.

Respectfully submitted,

GEORGE BUTLER,
J. ED. FRANKLIN,
LAMAR F. EASTERLING,
SIMON ROSENTHAL,
C. B. SNOW,
Attorneys for Appellee.

APPENDIX

"Judgment Based Upon Act of 1926. Same Statute May Be Constitutional in Part and Unconstitutional in Part

The inconsistency of the petitioner's position in this case is glaring. Petitioner comes here by petition for writ of certiorari for the purpose of sustaining the validity of Section 1, Chapter 259, Laws of 1926. In the same case, petitioner has prosecuted a direct appeal for the purpose of having Section 1, Chapter 282, Laws of 1914, declared unconstitutional. Yet, as heretofore stated (page 6) the law of 1926 is identical with the law of 1914, except for the proviso which exempts from its provisions a railroad whose main line is less than twenty-five miles in length in the district from the $350.00 tax per mile and places a special tax of $50.00 per mile thereon.

How counsel can maintain that the classification contained in the Act of 1914 is unconstitutional and at the same time maintain that the classification in the Act of 1926 is constitutional is beyond our understanding.

We again call the Court's attention to another inaccurate statement contained in the brief for petitioner (paragraph 2, page 10, paragraph 4, page 17, and page 20) wherein it is asserted that the Supreme Court of the State of Mississippi declared the entire Act of 1926 null and void and reinstated the Act of 1914. With the proviso complained of stricken out, the Act of 1926, as hereinbefore stated, became and was in fact the Act of 1914, and the Mississippi Supreme Court therefore held.

"* * * It will not be necessary for us to decide whether this results simply in the proviso of chapter 259, Laws of 1926, being void, or in the whole statute being void, for in either event the tax which the appellant will have to pay will be the same; that is, $350.00 per annum on each mile of its railroad in the levee district.

"For, if the statute should be held void, chapter 282, Laws of 1914, would remain in full force and effect, under which the complaining railroad's tax would be $350 per mile, the exact amount imposed by chapter 259, Laws of 1926; or, if the proviso only of chapter 259, Laws of 1926, is void, the same result would follow."

It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that part which is unconstitutional may be stricken out and rejected and the valid part of the statute retained.

6 *R. C. L.* 121.

Allen vs. Louisiana, 103 U. S. 80, L. ed. 318.

Adams vs. Standard Oil Co., 97 Miss. 879, 53 So. 692.

Ballard vs. Miss. Cotton Oil Co., 81 Miss. 507, 34 So. 533, 95 A. S. R. 476.

6 R. C. L. 121.

"It is a fundamental principle that a statute may be constitutional in one part and unconstitutional in another part, and that if the invalid part is severable from the rest the portion which is

constitutional may stand while that which is unconstitutional is stricken out and rejected; but where it is not possible to separate that which is unconstitutional from the rest of the act, then the whole statute falls. If after eliminating the invalid portions, the remaining provisions are sufficent to be operative and accomplish their proper purpose, it does not necessarily follow that the whole act is void. The constitutional and unconstitutional parts should be severable so that the valid portion may be read and may stand by itself. In determining the question whether the parts of a statute are severable within the meaning of this principle, the court acts by inspection of the statute. The constitutional and unconstitutional provisions of a statute may be included in one and the same section and yet be separable, so that some stand while others fall." 6 R. C. L. 121.

Allen vs. Louisiana, 103 U. S. 80.

"It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected.

* * * * * * *

Adams vs. Standard Oil Co., 97 Miss. 879, 53 So. 692.

"In treating this question, Judge Cooley, in his work on Constitutional Limitations (7th Ed.) pp. 246, 247, 248, says: 'Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so

connected together in meaning that it cannot be presumed the Legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand, though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial, but whether they are essentially and inseparably connected in substance'. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained."

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IN THE

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OCTOBER TERM, 1930

NO. 195

COLUMBUS & GREENVILLE RAILWAY CO., ET AL.,

Petitioners and Appellants,

VS.

W. J. MILLER, STATE TAX COLLECTOR FOR THE USE OF THE MISSISSIPPI LEVEE DISTRICT,

Respondent and Appellee.

BRIEF FOR RESPONDENT AND APPELLEE

GEORGE BUTLER,
J. ED. FRANKLIN,
LAMAR F. EASTERLING,
C. B. SNOW,
SIMON ROSENTHAL,
ATTORNEYS FOR RESPONDENT AND APPELLEE.



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IN THE

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Respondent and Appellee.

BRIEF FOR RESPONDENT AND APPELLEE

The opinions of the Supreme Court of Mississippi are reported as follows:

W. J. Miller, State Tax Collector, v. Columbus & Greenville Railway Co., 154 *Miss.* 317, 122 *So.* 366; *Columbus & Greenville Railway Co., v. W. J. Miller, State Tax Collector*, 127 So. 784. (Mississippi Report not published to date.)

STATEMENT OF THE CASE

Under the laws of the State of Mississippi, that part of the state lying and situate in what is known as the Mississippi Delta, comprising all of the state subject to overflow from the waters of the Mississippi and its large tributaries, is required to build, repair and maintain at its own expense

the levees located therein. The Delta is divided into two separate and distinct districts, the Mississippi Levee District and the Yazoo-Mississippi Delta Levee District. An attempt was made to divide the two districts in order that each district may maintain the levees which protected the land situated in the district. This case is in behalf of the Mississippi Levee District, comprising the southern half of the Delta.

The state at large pays no money towards the building, maintenance and upkeep of the levees and the legislature of the State of Mississippi, except by special act, exercises no supervision over the Levee System. A separate and distinct system of taxation is used in each district to raise the money to build, repair and maintain the levees.

The Mississippi Levee District was incorporated as a political subdivision by an act of the Mississippi Legislature, approved November 27th, 1865. Under the original act, the board of commissioners was authorized and empowered to levy a land tax of ten cents per annum on each and every acre of land in the district except school lands, to be designated as the acreage tax, and a uniform tax of one cent per annum on each and every pound of lint cotton raised and gathered in the district, to be designated as the cotton tax.

By an amendment approved February 21st, 1878, the commissioners were authorized to levy and assess, in addition to the acreage and cotton tax, an ad valorem tax of not more than five mills upon the assessed value of all property, real and personal, lying in the district.

By Chapter 7 of the Act of 1886, the commissioners were authorized and empowered to levy a mileage tax on the railroads in the district. It was about this time that the railroads entered the levee district. The Act of 1886 was amended by Chapter 125 of the Laws of 1908 so as to read as follows:

"Amendment to law levying taxes on railroad companies for support of levee system.

"Section 1. Be it enacted by the Legislature of the State of Mississippi, That Chapter VII of the Sheet Acts of 1886, be, and the same is hereby amended so as to read as follows:

"That for the purpose of contributing to the expense of building, maintaining and repairing levees in the Mississippi levee district, and of paying the debts and liabilities incurred therefor, by the board of Mississippi levee commissioners, the following tax is hereby levied and assessed upon all railroads and parts of railroads lying and situated in the said levee district, towit: Upon each and every mile of the main or trunk line of all broad or standard gauge railroads, not including sidetracks or switches, the sum of $200 per annum; upon each and every mile of narrow gauge railroad or railroads of less width than standard gauge, not including sidetracks or switches, the sum of $50 per annum; upon each and every mile of broad or standard gauge railroads, not used and operated as a main or trunk line, but constituting and used as a feeder to a branch of a main or trunk line, or to connect such main or trunk line with some other system, the sum of $120 per annum; provided, that no railroad or branch railroad shall be subject to taxation under this Act while the

same is in process of construction, but if any part thereof shall be used for profit, that part so used shall be taxed, although the whole of said railroad or branch may not be finished."

The amended act of 1908 was again amended by Section 1, Chapter 282 of the Mississippi Laws of 1914.

The predecessors in ownership of petitioner's road paid the taxes under the Act of 1914 without objection. The Columbus & Greenville Railway Company, petitioner here, was organized in 1923. In 1926 the law was again amended by Section 1, Chapter 259, Mississippi Laws of 1926. It is this section which is now before this Court. We quote in full Section 1, Chapter 259, Mississippi Laws of 1926:

"That for the purpose of contributing to the expense of building, maintaining and repairing levees in the Mississippi levee district, and of paying the debts and liabilities incurred thereof, by the board of Mississippi levee commissioners, the following tax is hereby levied and assessed upon all railroads and parts of railroads lying and situated in the said levee district, to-wit: Upon each and every mile of the main or trunk line of all broad or standard gauge railroads, not including side tracks or switches, the sum of $350.00 per annum; upon each and every mile of narrow gauge railroad or railroads of less width than standard gauge, not including side tracks or switches, the sum of $87.50 per annum; and upon each and every mile of broad or standard gauge railroads, not used and operated as a main or trunk line, but constituting and used as a feeder to or a branch of a main or trunk line, or to connect such main or

trunk line with some other system, the sum of $210.00 per annum; provided, that no railroad or branch railroad shall be subject to taxation, under this act while the same is in process of construction, but if any part thereof shall be used for profit, that part so used shall be taxed, although the whole of said railroad or branch may not be finished; *provided further that the tax per mile per annum on the main line of any railroad company which does not own in excess of twenty-five miles of railroad in the Mississippi levee district shall be* $50.00 *per annum.*" (Italics ours)

By omitting the part of the Act of 1926, which is shown in italics, we have the full text of the Act of 1914. It is the Amendment of 1926, shown in italics, that was declared unconstitutional by the Mississippi Supreme Court. The Mississippi Levee District is therefore maintained at the present time by four schemes or systems of taxation, to-wit:

(1) An acreage tax of two cents per acre on each and every acre of land in this district.

(2) A cotton tax on every pound of lint cotton raised and gathered in the levee district. (Cotton being the only crop grown in commercial quantities in the district.)

(3) An ad valorem tax upon all property in the district, real and personal.

(4) A mileage tax on railroads.

In 1890, the State of Mississippi adopted its present constitution, and said constitution provides as follows:

"Article 11. Levees.

"Section 227. A levee system shall be maintained in the state as provided in this article.

* * * *

"Section 236. The legislature shall impose for levee purposes, in addition to the levee taxes heretofore levied or authorized by law, a uniform tax of not less than two nor more than five cents an acre per annum upon every acre of land now or hereafter embraced within the limits of either or both of said levee districts. The taxes so derived shall be paid into the treasury of the levee board of the district in which the land charged with the same is situated; and the legislature, by the act imposing said tax, shall authorize said levee boards to fix the annual rate of taxation per acre within the limits aforesaid, and thereby require said levee boards, whenever a reduction is made by them in their other taxes, to make a proportionate reduction in the acreage tax hereinbefore mentioned; but said acreage tax shall not be reduced below two cents per acre per annum; and all reductions in such taxation shall be uniform in each of said districts; but the rate of taxation need not be the same in both of them; and such specific taxes shall be assessed on the same assessment roll, and collected under the same penalties, as the ad valorem taxes for levee purposes, and shall be paid at the same time with the latter. And no levee board shall ever be permitted to buy lands when sold for taxes; but the state shall have a prior lien for the taxes due thereto. The legislature may provide for the discontinuance of the tax on cotton, but not in such manner as to affect outstanding bonds based on it, and on the discontinuance of the tax on cotton, shall impose another tax in lieu thereof; but the legislature may repeal the acreage tax re-

quired to be levied hereby after the first day of January, A. D., 1895.

"Section 237. The legislature shall have full power to provide such system of taxation for said levee districts as it shall, from time to time, deem wise and proper.

"Section 238. No property situated between the levee and the Mississippi river shall be taxed for levee purposes, nor shall damage be paid to any owner of land so situated because of its being left outside a levee."

The proviso or amendment of 1926 is so clearly contrary to the spirit and letter of both the Constitution of the United States and of the State of Mississippi that the State Tax Collector decided to ignore said proviso and demanded of the Columbus & Greenville Railway Company that it pay the tax on the same basis as the other railroads of the same class in the district.

The State Tax Collector charged that the provision contained in said Section 1, Chapter 259, Laws of 1926, that,

"Provided further that the tax per mile per annum on the main line of any railroad company which does not own in excess of twenty-five miles of railroad in the Mississippi levee district shall be $50.00 per annum."

is unconstitutional because it violates the 14th Amendment to the Federal Constitution in that it denies to the other railroads in the district the equal protection of the law, and takes their property without due process of law, and that it violates the "due process" and "uniformity and equality

clause" of the Mississippi Constitution Section 14 and Section 236, which requires that "All reductions in such taxation shall be uniform in each of said districts," (page 6), referring in the latter section to the levee districts. It was also contended by the State Tax Collector that the law failed to comply with the mandatory provisions of Section 234 of the constitution, which requires that all revenue laws dealing with taxes in the levee district be published in a newspaper in said district. (See appendix for full text of Sections 14, 112 and 234.)

At the first trial, the Circuit Court of Montgomery County, Mississippi, sustained a demurrer to the declaration and the State Tax Collector appealed to the Supreme Court of the State. The Supreme Court reversed and remanded the case, and we quote the pertinent part of the opinion: (154 Miss. 314, 122 So. 366)

> "Smith, C. J. The defendant owns and operates a railroad, 18.41 miles of which lie in the Mississippi levee district, and this suit is to recover from it the sum of $12,150.60, levee taxes alleged to be due by it for the years 1926 and 1927, and statutory damages thereon. A demurrer to the tax collector's declaration was sustained in the court below, and his suit dismissed.
>
> "Chapter 7, Laws of 1886, imposed a levee tax on railroads in the Mississippi levee district of $100 per annum on each mile of the main line thereof in the district. This statute was amended by chapter 282, Laws of 1914, so as to impose a tax of $350 per annum upon each mile of the main line of railroads in the district. By Chapter 259, Laws of 1926, the 1914 statute was amended by adding

thereto the following: 'Provided, further, that the tax per mile per annum on the main line of any railroad company which does not own in excess of 25 miles of railroad in the Mississippi levee district shall be $50.00 per annum'.

"The appellee paid $50 per mile on its 18.41 miles of railroad in the district for the years 1926-1927, and this suit is to recover the difference between that amount and $350.00 per mile and damages thereon. The appellant's contentions are: That chapter 259, Laws of 1926, is void, and that consequently chapter 282 of the Laws of 1914 remains in full force and effect; but, if mistaken in this, that the proviso in chapter 259, Laws of 1926, is void.

"(1) Chapter 259, Laws of 1926, divides railroads into two classes: First, railroads having not more than 25 miles of railroad in the levee district; and, second, all other railroads therein. The ground of the appellant's contention is that this classification has no reasonable relation to the purpose for which the statute was enacted, but is arbitrary and unreasonable, and therefore in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution. This is so manifestly correct that the citation of authorities therefor would be supererogatory. It will not be necessary for us to decide whether this results simply in the proviso of chapter 259, Laws of 1926, being void, or in the whole statute being void, for in either event the tax which the appellee will have to pay will be the same; that is, $350 per annum on each mile of its railroad in the levee district."

On the second trial, the Circuit Court rendered judgment against the Columbus & Greenville Railway Company on the basis of $350.00 per mile. From this decision the railroad appealed and the Supreme Court affirmed the decision of the Circuit Court and rendered the following opinion:

> "Smith, C. J. This case is ruled by the opinion rendered on the former appeal herein (154 Miss. 317, 122 So. 366), to which we adhere; and the evidence excluded, if competent, as to which we express no opinion, could not have changed the result.
>
> "Affirmed."

ARGUMENT

Purpose of Tax

The purpose of the act as recited in the preamble thereof is as follows:

> "That for the purpose of contributing to the expenses of building, maintaining and repairing levees in the Mississippi levee district, and of paying the debts and liabilities incurred thereof, by the board of Mississippi levee commissioners, the following tax is hereby levied and assessed upon all railroads and parts of railroads lying and situated in the said levee district, to-wit:"

Section 238 of the Mississippi Constitution provides that:

> "No property situated between the levee and the Mississippi river shall be taxed for levee purposes * * * * *."

The intention and purpose of the law is that only property receiving benefits from the levees shall be taxed for their maintenance. The partakers of the benefits should bear proportionately the burden of the cost. *Williams vs. Commack*, 27 Miss. 209, 61 Am. Dec. 508; *Alcorn vs. Homer*, 38 Miss. 652; *Daily vs. Swope*, 47 Miss. 367; *Vassar vs. George*, 47 Miss. 713.

The brief of petitioners and appellants is divided into two main parts. The first contention is that the Act of 1886 and the amendatory Act of 1914 are unconstitutional and violative of the Fourteenth Amendment to the Federal Constitution. The second part of the brief is an attempt to support the petitioners' contention that the Act of 1926 is constitutional and the decision of the Mississippi Supreme Court should, therefore, be reversed. These contentions are inconsistent. On direct appeal the appellants contend that the mileage tax on railroads is unconstitutional, yet contend that a mileage tax statute which places a smaller tax on petitioner railroad company than on the other railroads in the district is constitutional.

Taxes Must Be Based on Benefit.

All taxation for said district must necessarily be based upon and governed by the standard of benefit, and all classification must be based upon and bear a reasonable and just relationship in respect to such benefit. *Adams v. Standard Oil Company*, 97 Miss. 879, 53 So. 692; *Chi. & St. Paul Railway Co. vs. Westby*, 178 Fed. 619; *Southern Ry. Co. vs. Green*, 216 U. S. 400, 30 Sup. Ct. 287; *Magoun vs. Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. ed. 1037; *Milken*

vs. Moffat Tunnel Imp. Dist., 262 U. S. 710, 43 Sup. Ct. 204; *Myles Salt Co. vs. Iberia, etc.*, 239 U. S. 478, 60 L. ed. 392; *Gulf C. & S. F. R. R. Co. vs. Ellis*, 165 U. S. 150, 17 Sup. Ct. 25, 41 L. ed. 666; *Voight vs Detroit*, 184 U. S. 115, 22 Sup. Ct. 337; 46 L. ed. 459. *General American Tank Car Corp. vs. Day*, 270 U. S. 367, 70 L. ed. 635; *Southern P. Co. vs. Kentucky*, 222 U. S. 63, 56 L. ed. 96. The benefit in this case applies to protection, and privilege, as well as betterment.

The General Rule As To Classification.

The classification of property for taxes must have some basis, reasonable or unreasonable, other than mere accident, whim or caprice. There must be some support of taste, policy, difference of situation or the like, or some reason for it, even if it is a poor one. If the classification results in an arbitrary and oppressive discrimination in regard to a class of citizens or a species of property, it contravenes the equal protection guaranty of the Federal Constitution. Such classification should treat all in the same class alike, and should not impose a heavier burden upon one than another of the same class, size, situation and value. The classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. *Cotting vs. Godard*, 183 U. S. 79, 46 L. ed. 92; *Louisville Gas & Electric Co. vs. Coleman*, 277 U. S. 32, 48 Sup. Ct. 423, 72 L. ed. 770; *Connolly vs. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431; *People vs. Mensching*, 187 N. Y. 8, 10 Ann. Cas. 101; *Fiscal Court vs. F. & A. Cox Co.* (Ky.), 117 S. W. 296, 21 L. R. A. (N. S.) 83; *A. & P. Tea Co. vs. Doughton*, 144 S. E. 701, 196 N. C. 145; *Fountain Park Co. v. Hensler* (Ind.), 155 N. E. 465, 50 A. L. R. 1518; *Detroit R. R. Co.*

vs. Fuller, 205 Fed. 86; *Nashville etc., R. R. Co. vs. Taylor*, 86 Fed. 168; *Vicksburg vs. Mulane*, 106 Miss. 199, 63 So. 412; *Adams vs. Standard Oil Co.*, 97 Miss. 879, 53 So. 692; *Hyland, Sheriff, vs. Sharp*, 41 So. 264, 88 Miss. 567, 12 C. J. 1152; *State vs. Banner Cleaners & Dyers, Inc.*, 127 So. 370, 170 La. ———; *Southern Ry. Co. vs. Green*, 216 U. S. 400, 30 Sup. Ct. 287.

In determining whether a state taxing law contravenes rights secured by the Federal Constitution the decision must depend "not upon any mere questions of form, construction or definition, but upon the practical operation and effect of the tax imposed."

Cooley, Law of Taxation, 4th Ed., Vol. 1, page 313; *Schaffer vs. Carter*, 252 U. S. 37, 64 L. Ed. 445, 40 Sup. Ct. Rep. 221.

History of Tax in District

We have outlined, at page 5 of this brief, the system of taxation in the Mississippi levee district. This system was inaugurated when the levee districts were first organized and the lands were first reclaimed from the backwaters of the Mississippi river.

The Act of 1865, Section 4, creating the district assessed "a uniform tax of ten cents per annum on each and every acre of land in said counties" and assessed a uniform tax of one cent per pound per annum upon each and every pound of lint cotton that may be raised and gathered in the counties comprising the district. Section 10 of the act makes

the taxes levied and collected a special fund and trust to be used by the Levee Board, first in payment of bonds and second in payment of other debts and liabilities.

Under Section 3, Laws of 1872 of Mississippi, the Levee Commissioners were authorized to levy and assess a uniform ad valorem tax upon the value of each and every acre of land lying and being situated in said district, and Section 4 of the Act of 1872 required the tax collector of each county embraced in the district to collect the tax upon the same terms and conditions as he collected the state and county taxes.

By the Act of 1877, Laws of Mississippi, a tax of five cents per one hundred pounds per annum on every one hundred pounds of cotton seed raised and gathered in the district was imposed. This tax was subsequently repealed by the Act of 1878. Prior to 1884 the levees were, therefore built and maintained by money raised by these three systems of taxation, to-wit, an acreage tax, being the same for every acre in the district, a cotton tax, being the same for every pound of cotton in the district, and an ad valorem tax having the same rate throughout the district. In assessing the acreage and cotton tax, the tax was based on quantity alone, without regard to the value or quality.

In the Eighties, the construction of railroads was begun in the Mississippi levee district and in 1886 the Legislature of Mississippi passed what is commonly designated as the "Mileage Tax Act." In 1890 Mississippi adopted its present constitution and by Section 236 the constitution retained the system of taxation then used in the levee districts.

The constitution of Mississippi, therefore, recoghizes in all respects the mileage tax.

By Chapter 282, Mississippi Laws of 1914, the Act of 1886 was amended. By this act, the full text of which appears at page 4 of this brief, a uniform tax of $350.00 per mile per annum was levied on all main lines in the district. It is this act that petitioners contend is violative of the Fourteenth Amendment to the Federal Constitution.

It may be well at this time to direct the Court's attention to the fact that the mileage tax has been in existence since 1886 and that the Yazoo & Mississippi Valley Railroad Company, the other railroad in this district, has paid this tax since said time and that the Georgia & Pacific Railroad, which constructed the present road bed of the Columbus and Greenville Railway Company and the Southern Railway Company, which purchased same from the Georgia & Pacific, paid the tax. The petitioner, Columbus & Greenville Railway Company, was organized in 1923 and took over the present road bed and right of way. The State of Mississippi and the Mississippi levee district did not force the Columbus & Greenville Railway Company to enter the levee district. It entered the district with full knowledge of the mileage tax and with full knowledge that said tax had been levied and collected for thirty-eight years. It certainly cannot be heard to contest the validity of the tax and is estopped from attacking the system of taxation in vogue in the district at the time it entered.

System of Taxation Not Peculiar to State of Mississippi

The system of levee taxes used by the State of Mississippi is identically the same as that adopted and used in the levee districts of Louisiana. Louisiana Constitution of 1921, Article 26.

In 1890 the Louisiana Legislature created two of its main levee districts. Chapter 97, page 107, Laws of 1890, created "The Atchafaylaya Basin Levee District," and Chapter 95, page 99, created "The Pontchartrain Levee District." The Atchafaylaya Basin Levee District, by Section 8, was authorized to levy an ad valorem tax of ten mills, by Section 9 the commissioners were authorized to assess and collect an acreage tax of two and one-half cents and "$60.00 per mile of railroad lines within said district;" and Section 10 to levy and assess a tax of twenty-five cents per bale of cotton; twenty-five cents per thousand pounds of sugar; one and one-half cents per barrel of syrup and five cents per barrell on molasses, and similar taxes on produce.

The Ponchartrain Levee District has the same system of taxation and under Section 11 a tax of "$100.00 per mile on each and every mile of main line of railroad within said district" was assessed and collected.

This system of taxation has been repeatedly upheld by the Louisiana Supreme Court. *Morgan's Louisiana & T. R. & S. S. Co. vs. Aucoin, Tax Collector*, 140 La. 768, 73 So. 859; *J. H. Hines Co., Inc. vs. Guillot, Sheriff*, 153 La. 319, 95 So. 794. Writ of error dismissed 266 U. S. 58.

In *Board of Commissioners for Buras Levee District vs. Mialegvich*, 52 La. Ann., page ——, 27 So. 790, the Louisiana Supreme Court upheld a special assessment for levee taxes of two and one-half cents per barrel of oysters gathered from the waters of the district.

In 1904, Act No. 909, Laws of Louisiana, the Red River and Bayou Desglaizes Levee & Drainage District was created. The Louisiana Legislature carried forward the same system of taxation. Section 6 levied an ad valorem tax of ten mills, Section 7 an acreage tax of five cents, Section 8 a tax of fifty cents a bale on cotton and Section 9 a mileage tax on railroads of $60.00 a mile. By Act No. 195, page 256, Laws of Louisiana of 1928, Section 7 was amended and the acreage tax increased to twenty-five cents and the mileage tax to $100.00 per mile.

It will, therefore, be noted that the two states near the mouth of the Mississippi river, Louisiana and Mississippi, have, since the creation of the levee districts, adopted the same system of taxation. This system has been in vogue in said state since the creation of the levee districts. The systems of taxation have been repeatedly before the Supreme Courts of both states and before the Supreme Court of the United States. No attack has ever been made on the constitutionality of the mileage tax for levee benefits in this Court. The Columbus & Greenville Railway Company, created in the year 1923, with full knowledge of the systems of taxation, now comes before the Supreme Court of the United States and asks that the taxation systems for the levee districts of Louisiana and Mississippi be declared un-

constitutional. It is our contention that said systems are fair and equitable and have been so recognized ever since the creation of the districts, and the petitioner, a newcomer, cannot be heard, and is estopped, to contest the validity of said tax systems.

If the mileage tax is unconstitutional, then the Cotton tax of one fifth cent per pound, ($1.00 a bale), the acreage tax, and in Louisiana the sugar, molasses and oyster taxes based upon a fixed sum per barrel, are unconstitutional. That is the entire system of taxation used in the levee districts since their creation are unconstitutional.

Columbus & Greenville Railway Company is Estopped to Object to Mileage Tax.

The Columbus & Greenville Railway Company, having purchased its property after the system of taxation had been in existence for over thirty-seven years, is to that extent precluded from resisting said taxes. *J. H. Hines Co. vs. Guillot, Sheriff*, 153 La. 319, 95 So. 794. Writ of error dismissed for want of jurisdiction, 266 U. S. 58, 69 L. Ed. 452, 45 Sup. Ct. 89. Quoting.

> "The Act 206 of 1912 increased the acreage tax to 10 cents, and the Act No. 202 of 1918 again increased it to 25 cents per acre. So that when plaintiff bought its property on April 1, 1918, the ad valorem tax and the acreage tax of 10 cents per acre were already being levied; and, under the ruling in *Duffy vs. Penegwy*, supra, plaintiff is to that extent precluded from resisting them . . . ."

When the Columbus & Greenville Railway Company accepted its charter from the State of Mississippi and went into the levee district to do business, it entered into a contract with the State of Mississippi. Commencing with the Dartmouth College case, the Supreme Court of the United States has repeatedly held that the rights granted to corporations under charters are contractual rights. When the railroad company accepted its charter and entered the levee district, it contracted with the State of Mississippi that it would obey its laws and would pay all taxes legally assessed against it. It knew that under the Laws of the State of Mississippi it was liable for a mileage tax in the levee district and it contracted to pay said tax. *State vs. Chicago & N. W. Railway Co.*, 128 Wisc. 449, 108 N. W. 594; *People, Ex Rel, East River Terminal Co. vs. State Board of Tax Commissioners (City of New York intervener)*, 160 App. Div. 771, 146 N. Y. S. 112, (Same Style) 79 Misc. 134, 140 N. Y. S. 722; *Ford vs. Delta Pine and Land Co.*, 164 U. S. 662, 17 Sup. Ct. 230, 41 L. Ed. 590. (The Ford case involves taxation in this district.)

Mileage Tax Valid.

It is universally held that a special assessment for reclaiming a district from inundation laid upon land in proportion to its area, is valid dispite constitutional provisions of valuation and uniformity. The creation of levee districts is done under the police power of the state and its powers of taxation are not confined to the strict rules of uniformity required under the regular and ordinary taxes. From our investigation, we find that in practically every state of the union that drainage and levee taxes are levied

in the same manner as in the Mississippi levee district. It is customary to levy a fixed tax on each and every acre in the district without regard to the value of the land. *Houck vs. Little River Drainage District*, 60 L. Ed. 266, 239 U. S. 254; *Cole vs. Norhouse Drainage District*, 270 U. S. 45, 70 L. Ed. 463; *Egyptian River Co. vs. Hardy*, 27 Mo. 495; *Trulock Irrigation District vs. Williams*, 76 Cal. 360, 18 Pac. 379; *McGehee vs. Mathis*, 21 Ark. 40; *Richardson vs. Morgan*, 16 La. 429. Also see the Louisiana and Mississippi cases heretofore cited.

The same rule and reason that upholds the validity of the Act of 1886, as amended by the Act of 1914, assessing the same tax per mile on all railroads in the district, invalidates the Act of 1926, fixing the rate per mile of one railroad at $350.00 and the rate per mile of the petitioner railroad company at $50.00 a mile.

The legislature and the levee board is clearly within its rights in placing all railroads in the district in one class and placing a mileage tax thereon. *Pittsburgh, etc., R. R. Co. vs. Backus*, 154 U. S. 431, 14 Sup. Ct. 1114, 38 L. Ed. 1031; *Cleveland Railroad Co. vs. Backus*, 154 U. S. 443, 14 Sup. Ct. 1122, 38 L. Ed. 1041; *Western Union Telegraph Company vs. Attorney General*, 125 U. S. 530, 31 L. Ed. 790; *Pullman Palace Car Co. vs. Pennsylvania*, 141 U. S. 18, 35 L. Ed. 613.

The assessment of the same class and kind of property, occupying the same situation, at a different rate of taxation for each owner, is clearly violative of the Fourteenth Amendment to the Federal Constitution. *Houck vs. Little River*

District, 239 U. S. 254, 60 L. Ed. 266; *Louisville Gas & Electric Co. vs. Coleman*, 277 U. S. 32, 72 L. Ed. 770; *Royster Guano Co. vs. Virginia*, 253 U. S. 412, 64 L. Ed. 989; *Cotting vs. Godard*, 183 U. S. 79, 46 L. Ed. 92; *Fiscal Court of Owen County vs. F. & A. Cox Co.*, 117 S. W. 296 (Ky.), 21 L. R. A. (N. S.) 83.

The unconstitutionality of the amendment made in 1926 is clearly demonstrated by a discussion of the operation and effect of the tax in this case

The Practical Operation and Effect of the Tax in This Case.

The practical operation and effect of the amendment of 1926 is to exempt the Columbus & Greenville Railway Company from its proper proportion of the tax, and to impose an arbitrary and unreasonable proportion upon the Yazoo & Mississippi Valley Railroad Company, and favors a Intrastate road located wholly within the state over a road located partly within and partly without the state. It amounts to an arbitrary and oppressive discrimination between two similar species of property and between two persons of the same class and situation.

The classification in the case at bar is based solely upon a mileage basis. The value of the railroad property, the business done, the gross earnings, the direction of the railroad, its closeness to the river, or even the number of years in operation are not taken into consideration.

What is the effect of the classification in this case?

All main line railroads over twenty-five miles in length pay $350.00 per mile, and all main line railroads under twenty-five miles pay $50.00 per mile. On the other hand, a narrow gauge railroad, without respect to the number of miles pays $87.50 per mile, and a branch line, without respect to the length thereof, pays $210.00 per mile, a classification so unreasonable that the Honorable Chief Justice of the Mississippi Supreme Court said that the citation of authorities was unnecessary to support an opinion declaring the same unconstitutional.

Counsel for petitioner continually called the tax a graduated tax. This is incorrect, as the tax is not a graduated one. To be classified as a graduated tax, it should have provided that a railroad shall pay $50.00 on the first twenty-five miles and $350.00 on each mile in excess thereof. But in its zeal to favor the intrastate road, the legislature has required the Yazoo & Mississippi Valley Railroad Company to pay the large sum of $350.00 on its first mile and on each and every mile.

Under this classification a main line railroad twenty-six miles in length pays $8100.00 and a main line railroad twenty-four miles in length pays only $1200.00. The petitioner operates eighteen miles in the district and is the only railroad company operating less than twenty-five miles in the district. Classification under the Act of 1926 is as follows;

Class 1. A main or trunk line standard gauge railroad, exclusive of side tracks and switches, pays on each

and every mile, $350.00, or if twenty-five miles long, it pays $8100.00.

Class 2. A narrow gauge railroad less than standard, exclusive of side tracks and switches, pays on each and every mile, $87.50, or for eighteen miles, $1575.00.

Class 3. Upon each feeder or branch of a main line or trunk line, $210.00 on each and every mile, or for eighteen miles, $3780.00.

Class 4. Main line railroad operating not in excess of twenty-five miles in the district pays $50.00 on each and every mile, or for eighteen miles, $900.00.

The petitioner operates eighteen miles in the district, and is the only railroad in Class 4.

The photostatic map of railroad mileage in the record shows the Columbus & Greenville Railroad Company runs from Greenville through Leland, *or east and west*, a distance of 18.41 miles.

The Yazoo & Mississippi Valley Railroad Company, the other railroad company in the district, has numerous branches in the district, one running from Rosedale to Dockery, *east and west*, 28.21 miles; one running from Kelso to Holly Bluff, *east and west*, 15.99 miles; one running *north and south* from Helm to Jacobs Station, designated "H. & N. W.," on the map, 9.6 miles; and one running from Hampton to Glen Allen, two miles. The Y. & M. V. system itself constitutes two main lines through the district, merging at Rolling Fork, in Sharkey County.

Yet the Yazoo & Mississippi Valley Railroad Company pays $210.00 per mile on said branch lines and the Columbus & Greenville Railroad Company pays only $50.00 on its main line.

It may be well a this point to discuss the classification of railroads under Section 186 of Chapter 118, Mississippi Laws of 1926, shown in the record at page 443 and discussed in the brief of petitioners at page 16.

The attorneys for petitioners have a great deal to say about the Yazoo & Mississippi Valley Railroad Company being classified for privilege tax purposes as a first class road and the Columbus & Greenville Railway being classified for privilege tax purposes as a third class road. This classification was purely for privilege tax purposes, and is an occupation tax based solely upon earning power and valuation of the roads and had no relation whatsoever to local improvement taxes.

Taking the classification, however, the argument of the petitioner hits back like an Australian boomerang. The Kelso-Holly Bluff branch (15.99 miles) of the Y. & M. V. runs in the same direction as the Columbus & Greenville Railway Company, (18.21 miles) yet it pays $3,357.90, while the Columbus & Greenville Railway Company pays $920.50. Both are classed as "Class 3" roads. Take the H. & N. W. branch of the Y. & M. V. system, which is classified also as a "Class 3" road. This railroad, 9.6 miles long, running between two very small towns, operated at a great loss to the railroad company, is assessed for $2,016.00, in comparison with $910.50 for the Columbus & Greenville Rail-

way Company. The Interstate Commerce Commission has since the decision in this case authorized the removal of the H. & N. W. branch for lack of necessity.

A greater inequality cannot be had than is shown by the following illustration: The Y. & M. V. Railroad Company has a small branch line running from Hampton to Glen Allen in the Southern part of Washington County, a distance of two miles. The tax on these two miles is $420.00, while the tax on the Columbus & Greenville Railroad Company is only $910.50 for a main line 18.41 miles long, across the entire levee district.

The petitioner attempts to paint the Y. & M. V. Railroad Company as a gigantic organization with splendid road beds and enormous profits, while the petitioner is only a weakling losing money and with road beds thereof about to crumble. This contention may well be answered by the evidence itself, which shows that the total capitalization of the Columbus & Greenville Railway Company is $100,000.00, (Record page 5) and that the net profit for the operation of the Columbus & Greenville Railway Company was $85,124.25 for the year 1925, $159,392.08 for the year 1926, and $105,144.07 for the year 1928 (Record page 28). The Columbus & Greenville Railway Company, when it comes to fixing a value for the purposes of taxation, is assessed at $1,000.00 per mile, but when it files a statement with the Interstate Commerce Commission for the purpose of fixing rates, it values its property at $38,000.00 per mile.

As heretofore stated, we do not think that gross earnings or valuation have any effect upon the levee taxes, which

in all cases are based upon quantity alone. We merely quote the above figures in answer to the petitioner's statement as to the value of its company.

Counsel for petitioner have much to say with reference to the effect upon the road bed of the Columbus & Greenville Railway Company of floods and of the effect upon the road bed of the Y. & M. V. Railroad Company. We answer this by two statements. As shown by the record, the Columbus & Greenville Railway Company suffered far more in proportion by the break of 1927 than the Y. & M. V. Railroad Company, and by the statement that the Y. & M. V. Railroad Company has more mileage east and west in the district than the Columbus & Greenville Railway Company.

It is a matter of common knowledge that the Mississippi river is a non-respecter of rule or reason, that its channel is ever changing and its course not straight, but winding and crooked, and it is foolish thing indeed for any man to say that because the railroad company runs east and west or north and south that it is less liable to suffer damage from overflow by the Mississippi river.

Let us view this tax from the view point of the other forms of taxation in the district.

There is levied an acreage tax of two cents per acre on land in the district. Suppose the tax was changed so as to read that a tax of one cent per acre is levied on all farms of twenty-five acres or less, and a tax of four cents per acre is levied on all farms of over twenty-five acres. Being a benefit tax, could same possibly be upheld? We think not.

A tax of one dollar per bale is levied on all lint cotton raised and gathered in the district. Were the tax changed to provide that a tax of fifty cents per bale must be paid by all farmers raising one hundred bales of cotton or less, and a tax of two dollars per bale paid by all farmers raising more than one hundred bales, could same possibly be held constitutional?. We think not. The benefit to each and every acre of land in the district and the corresponding benefit to each and every bale of cotton from the protection afforded by the levees is the same. The benefit to each and every mile of standard gauge railroad in the district is identically the same.

> "It must appear not only that a classification has been made, but also that it is one based upon some reasonable grounds—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection, and there can be no discrimination between subjects which properly belong to the same class. The right of classification is allowed in order to avoid or correct inequalities, never to create them." 26 *R. C. L., Taxation*, Sec. 216, and authorities above cited.

The effect and operation of the tax herein levied is to impose a gigantic tax in the aggregate on the Yazoo & Mississipi Valley Railroad Company, and on the other hand, to require the petitioner, Columbus & Greenville Railway Company, to pay only a nominal tax in proportion. This tax certainly bears no reasonable relationship to the purpose of the tax, which, as heretofore stated, is based solely upon the benefits of levee protection.

The Amendment of 1926, Exempting Railroads of Less than Twenty-five Miles in Length in the District from the Regular Tax and Placing a Minimum Tax Thereon, Violates the Mississippi Constitution and the Fourteenth Amendment to the Federal Constitution.

Cotting v. Godard, 183 U. S. 79, 46 L. Ed. 92; *Louisville Gas & Electric Co. vs. Coleman*, 277 U. S. 32, 48 Sup. Ct. Rep. 423, 72 L. Ed. 770; *People ex rel Farrington vs. Mensching*, 187 N. Y. 8, 10 Ann. Cas. 101; *Fiscal Court of Owen County vs. F. & A. Cox Company*, 117 S. W. 296, 21 L. R. A. (N. S.) 83; *Fountain Park Company v. George Hensler, et al* (Ind.), 155 N. E. 465, 50 A. L. R. 1518; *A. & P. Tea Company v. Doughton*, 144 S. E. 701, 196 N. C. 145; *Adams vs. Standard Oil Company*, 97 Miss. 879, 53 So. 692.

Cotting vs. Godard, 183 U. S. 79, 46 L. ed. 92.

The State of Kansas enacted a law regulating rates for stockyards in the state and providing that said law should apply only to those receiving over one hundred head of cattle per day. This Court, speaking through Mr. Justice Brewer, held the same unconstitutional, and we quote from the opinion:

> "But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection

is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other. There can be no pretense that a stock yard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, and the only difference is that one does more business than the other. But the receipt of an extra 2 head of cattle per day does not change the character of the business. If once the door is opened to the affirmance of the proposition that a state may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guaranty of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron referred to in the quotation above made. This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but it is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would. We think, therefore, that the principle of the decision of the Supreme Court of Kansas in *State v. Haun*, 61 Kan. 146, 47 L. R. A. 369, 59 Pac. 340, is not only sound, but is controlling in this case, and that the statute must be held unconstitutional as in

conflict with the equal protection clause of the 14th Amendment."

Louisville Gas & Electric Co. vs. Coleman, 277 U. S. 32, 48 Sup. Ct. Rep. 423, 72 L. ed. 770.

A Kentucky statute taxing the recording of mortgages running more than five years and exempting from the tax those which matured within five years or less was held to violate the equal protection clause of the Federal Constitution as arbitrary classification:

> "Here it seems clear that a circumstance which affects only taxable values has been made the basis of a classification under which one is compelled to pay a tax for the enjoyment of a necessary privilege which, aside from the amount of the recording fee which is paid by each, is furnished to another as a pure gratuity. Such a classification is arbitrary. It bears no reasonable or just relation to the intended result of the legislation. The difference relied upon is no more substantial, as the sole basis for the present classification, than a difference in value between two similar pieces of land would be invoked as the sole basis for a like classification in respect to such property. Certainly one who is secured by the state in the priority of his lien for a period less than five years enjoys a privilege which in kind and character fairly cannot be distinguished from one who enjoys a like privilege for a longer period of time. The former reasonably may be required to pay proportionately less than the latter; but to exact, as the price of a privilege which, for obvious reasons, neither safely can forego, a tax from the latter not imposed in any degree upon the for-

mer, produces an obvious and gross inequality. If the state, upon the same classification, had reversed the process and taxed indebtedness maturing within a shorter period than five years, and exempted such as matured in a longer period, the inequality probably would be readly conceded, but the constitutional infirmity, though more strikingly apparent, would have been the same."

Fiscal Court of Owen County vs. F. & A. Cox Company, 117 S. W. 296, 21 L. R. A. (N. S.) 83;

The Kentucky statute placed a tax of seventy-five dollars on each three horse wagon operated for business, and a tax of two hundred dollars on each four horse wagon operated for business. The tax, being such an arbitrary discrimination and distinction, was held void.

"Furthermore, the order itself shows that the owner of a four-horse wagon is required to pay three times as much tax as the man who operates a three-horse wagon, when there is nothing in the character of the wagons to justify such inequality. It may be conceded that a reasonable classification for the purpose of license taxes may always be made. Classification based upon the character of the vehicles and the number of horses used in connection with them may be proper (*Smith v. Louisville*, 9 Ky. L. Rep. 779, 6 S. W. 911), but the classification sought to be made in this case is manifestly unequal and unreasonable. It cannot be said to be reasonable because it bears alike upon all owners of four-horse wagons. The class of persons whose occupations are taxed are those who run and operate vehicles for hire. The taxing power may subdivide this class, but it cannot

unjustly discriminate between the subdivisions so made. As the order in question unjustly discriminates between the owners of three-horse vehicles and the owners of four-horse wagons, it follows that the license fee of $200, imposed upon four-horse wagons, is therefore void. *Livingston v. Paducah*, 80 Ky. 656; 1 *Dill, Mun. Corp.* 323; *Simrall v. Covington*, 90 Ky. 444, 9 L. R. A. 556, 29 Am. St. Rep. 398, 14 S. W. 369; *Cooley, Tax.* 127; *Hager v. Walker*, supra."

The Authorities Cited by Petitioners and Appellants Distinguished.

We note that most of the decisions in which the tax on railroads for special improvements have been declared unconstitutional are those dealing with road improvement districts.

In *Road Improvement District No. 1 vs. Missouri Pacific Railroad Co.*, 2 Fed. (2) 340 (Ark.), the tax was held invalid because,

> "No direct benefit on account of the construction of the highway would result to the railroad company, but that any benefit attempted to be shown was indirect, remote, doubtful and speculative in its nature, and that a purported agreement between the railroad and the commissioners attempting to fix the benefits upon a mileage basis was void."

The evidence further showed that for the construction of a road of 11.2 miles, the railroad with 9.7 miles of rail-

road in a purely farming section was required to pay $2,300.00 a mile.

In *K. C. S. Railway Company vs. May*, 2 Fed. (2) 680 (Ark.), the evidence showed that the benefit to the railroad company from the construction of a gravel highway was purely problematical and that the railroad was assessed on the basis of $10,000.00 a mile.

The road district cases cited in the brief of appellants can all be so distinguished. Who can say that the construction of a gravel highway through a farming section will benefit the property of railroad companies to such a greater extent than the property of individuals and corporations? In fact, the construction of modern roads has in many instances destroyed the profit of railroad companies and the numerous cases before this court and the Interstate Commerce Commission clearly show that the profit from passenger business has been completely destroyed insofar as local transportation is concerned. The construction of drainage and levees build up the community and increase the products of the community, thereby increasing the freight to be hauled by the railroad companies. The construction of levees and drainage protects the property in the community and saves it from destruction from overflow. Road districts are governed by betterments, while levee districts are governed by betterments, privileges and protection.

In *Kansas City S. Railway Co. vs. Ogden Levee District*, 15 Fed. (2) 637, the Court had under consideration an ad valorem tax and the testimony showed that farm

lands in the district, regardless of value, were assessed at $10.00 per acre, being about 5 to 15 per cent of the value, while railroad property was assessed at over 50 per cent of its value, a discrimination palpably arbitrary and unfair.

We have no fault to find with the other citations of counsel for the appellants and petitioners. In fact, the citations can all be quoted to show that the amendment of 1926 is violative of the Fourteenth Amendment to the Federal Constitution.

In *Eureka Pipe Line Company vs. Hallinan*, 105 S. E. 586; *Clarke vs. Tiltonville*, 104 U. S. 329, 46 L. Ed. 569; *Citizens Telegraph Company vs. Fuller*, 229 U. S. 322; *Quan Wing vs. Kirkendall*, 223 U. S. 59, 56 L. Ed. 250, the courts had under consideration occupation and business taxes, and the classification for purpose of occupation taxes on the basis of amount of business or size of establishment were held valid.

In the cases cited in the brief dealing with inheritance and income taxes, all of the taxes are graduated taxes and the income and inheritance of all parties are taxed alike. The Federal Income Tax Law provides, in cases of married persons, an exemption of $3500.00. This exemption is granted to all alike, regardless of the size of income. The next $5,000.00 of every man's income is taxed at the same rate, and this is true of every class. In the case before this Court, the first mile of the Y. & M. V. Railroad Company is taxed the sum of $350.00, and the first and each and every mile of the branch lines of the Y. & M. V. Railroad Company in the district are taxed at $210.00 a mile, while the entire

system of the Columbus & Greenville Railway Company is taxed at $50.00 a mile. This is not a graduated tax, but in reality an exemption and a palpable and arbitrary discrimination between property of the same kind and character in the same class and situation, occupying identically the same position and receiving in every way the same benefits.

We note that in an attempt to uphold the amendment of 1926, the petitioners (page 66 of brief) uphold the mileage tax and give it a historic background, yet in the first part of the brief, when petitioners want the entire law declared unconstitutional, it attacks the mileage classification.

At Page 69 (e), the Contention Is Made That W. J. Miller, State Tax Collector, Is in No Position to Present the Federal Question.

This is a moot question in this Court, as the tax has been declared invalid by the Supreme Court of Mississippi and the Columbus & Greenville Railroad Company is the appellant and petitioner here. The Supreme Court of Mississippi held that the State Tax Collector was a proper person to attack the validity of a law and insofar as this particular case is concerned, settled this question.

The rule in Mississippi is stated in the case of *Toombs vs. Sharkey*, 140 Miss. 676, 106 So. 273:

> "We are of the opinion that the Board of Supervisors are the fiscal agents of the county in that they levy the county tax, fix the rate, and appropriate the tax money to the objects provided by the law, and that *when a question is presented involving the tax affairs of the county and affecting*

> each and every taxpayer as to whether a less or greater sum shall be paid from the county treasury and there be serious question as to whether the law is void or not, this court will permit a board of supervisors bona fide to test the constitutionality of the statute in question."

See also *Norton vs. Shelby County*, 118 U. S. 425, 30 L. Ed. 178; *State vs. Candland*, 104 Pac. 285, 36 Utah 404, 140 Am. St. R. 834.

Constitutionality of Act Under the State Constitution.

The contention is made that the State Supreme Court held the Act of 1926 constitutional under the Mississippi Constitution. We take issue on this contention, and state that the Mississippi Supreme Court did not pass upon the constitutionality of the act under the Mississippi Constitution. In fact, the pleadings show that the Constitution of Mississippi, Section 234, Article 11, Mississippi Constitution of 1890, requires that all bills affecting taxation or revenue in the Mississippi levee district shall be published in some newspaper published in the county in which is situated the domicile of the board of levee commissioners of the levee district affected thereby, four weeks prior to the introduction thereof in the legislature. (Section 234 is copied in full in the appendix.) The evidence in this case conclusively shows that the bill introduced in 1926 was never published in accordance with the provisions of the constitution, and is, therefore, a void law.

We also direct this Court's attention to Section 14 of the Mississippi Constitution, which provides:

> "No person shall be deprived of life, liberty or property except by due process of law."

The "due process" clause of the Federal Constitution and the Mississippi Constitution have the same meaning in matters of this kind. *Rodge vs. Kelly, Tax Collector*, 88 Miss. 209, 40 So. 552; *Hyland, Sheriff, vs. Sharp*, 88 Miss. 567, 41 So. 264. *D'Aquilla vs. Anderson*, 120 So. 434, 153 Miss. 549.

SUMMARY

The Act of 1926, insofar as the same discriminated between main line railroads less than twenty-five miles in length in the levee district, and main line railroads in excess of twenty-five miles violated the 14th Amendment to the Constitution of the United States, and the "due process" and the "uniformity and equality" clauses of the Mississippi Constitution. The tax being levied and assessed solely for the purpose of building, repairing, and maintaining levees and for protection from overflow, the provisions of the law favoring in its intent and purpose the intrastate railroad located wholly within the state is unreasonable and arbitrary, and bears no relationship to the purpose of the tax, and is a palpable, whimsical and arbitrary discrimination between two similar species of property and between two persons of the same class in the same situation.

We respectfully submit that (a) Chapter 7 of the Acts of 1886, as amended by Chapter 282 of the Acts of 1914,

Laws of Mississippi, is constitutional and does not in any way violate the Fourteenth Amendment to the Constitution of the United States; (*b*) that Chapter 259, Mississippi Laws of 1926, violates the Fourteenth Amendment to the Constitution of the United States in that it is a palpable, whimsical and arbitrary discrimination between the Columbus & Greenville Railway Company and the Yazoo & Mississippi Valley Railroad Company in favor of the former; and (*c*) the decision of the Supreme Court of Mississippi is correct and should be affirmed.

Respectfully submitted,

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APPENDIX

Section 14, Article 3, Mississippi Constitution 1890.

"No person shall be deprived of life, liberty or property except by due process of law."

Section 112, Mississippi Constitution 1890.

"Taxation shall be uniform and equal throughout the state. Property shall be taxed in proportion to its value. The legislature may, however, impose a tax per capita upon such domestic animals as from their nature and habits are destructive of other property. Property shall be assessed for taxes under general laws, and by uniform rules, according to its value. But the legislature may provide for a special mode of valuation and assessment for railroads, and railroad and other corporate property, or for particular species of property belonging to persons, corporations, or associations not situated wholly in one county. But all such property shall be assessed at its true value, and no county shall be denied the right to levy county and special taxes upon such assessment as in other cases of property situated and assessed in the county."

Section 234, Article 11, Levees, Mississippi Constitution 1890.

"No bill changing the boundaries of the district, or affecting the taxation or revenue of the Yazoo Mississippi Delta Levee District, or the Mississippi Levee District, shall be considered by the legislature unless said bill shall have been published in some newspaper in the county in which is situated the domicile of the board of levee

commissioners of the levee district to be affected thereby, for four weeks prior to the introduction thereof in the legislature; and no such bill shall be considered for final passage by either the senate or house of representatives, unless the same shall have been referred to, and reported on, by an appropriate committee of each house in which the same may be pending; and no such committee shall consider or report on any such bill unless publication thereof shall have been made as aforesaid."

We received this afternoon, after the brief was on the press, Volume 70, American Law Reports. We direct the Court's attention, to the able and exhaustive annotation on "Constitutionality of Levee and Flood Control Acts", and the sub-annotations thereunder, "Police Power" and "Due process and equal protection or privilege" at pages 1274 et seq. The annotations support our contentions in every respect.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

NO. 195

COLUMBUS & GREENVILLE RAILWAY CO., ET AL., Petitioners and Appellants,

VS.

W. J. MILLER, STATE TAX COLLECTOR FOR THE USE OF THE MISSISSIPPI LEVEE DISTRICT,

Respondent and Appellee.

MOTION FOR PERMISSION TO FILE SUPPLEMENTAL BRIEF
and
SUPPLEMENTAL BRIEF OF APPELLEE AND RESPONDENT

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W. J. MILLER, STATE TAX COLLECTOR FOR THE USE OF THE MISSISSIPPI LEVEE DISTRICT, Respondent and Appellee.

MOTION FOR PERMISSION TO FILE SUPPLEMENTAL BRIEF

Comes now W. J. Miller, State Tax Collector, for the use of the Mississippi Levee District, respondent and appellee in the above styled cause, by his counsel of record, and moves the Court for permission to file herewith a supplemental brief and assigns as the reason therefor the following: Since the filing of the briefs in this cause the Supreme Court of the State of Mississippi has rendered a decision in the case of W. J. Miller, State Tax Collector, vs. Yazoo & Mississippi Valley Railroad Company, dealing with the questions before the Supreme Court of the United States in this case, and it is the purpose to set forth the opinion of the court in full in the supplemental brief.

Respectfully submitted,

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Respondent and Appellee.

SUPPLEMENTAL BRIEF OF APPELLEE AND RESPONDENT

On Monday, February 23, 1931, the Supreme Court of the State of Mississippi rendered a decision in cause No. 28,812, styled *W. J. Miller, State Tax Collector, for the use of the Mississippi Levee District, v. Yazoo & Mississippi Valley Railroad Company.*

As shown by the opinion of the State Court, the railroad companies have not in the past, and do not now pay any ad valorem tax in the levee district. The State Tax Collector was attempting to collect an ad valorem tax from the railroad companies and for this reason it would have

been unfair to have made the statement in the original briefs that no ad valorem taxes have been paid by the railroad companies. However, the State Court has held that the railroad companies in the levee district are liable only for the mileage tax; that is, the mileage tax paid by the railroads is in lieu of any and all other taxes in the district and constitutes the only tax paid by railroad companies.

This decision, therefore, we think completely settled all questions involved in the case now being presented to the Supreme Court of the United States.

There is no doubt as to the constitutionality of a statute which places all railroads in one class for the purpose of taxation and assesses only a mileage tax on the property in lieu of all other taxes.

If this court should hold that the Mileage Tax Act of 1886 as amended by the Act of 1914 is unconstitutional, it would mean, therefore, that the petitioner and appellant, Columbus and Greenville Railway Company, would pay no taxes of any kind or character in the levee district, or if this court should reverse the decision of the Supreme Court of Mississippi and hold the amendment of 1926 valid, it would mean that the only tax paid by the Columbus & Greenville Railway Company to the Mississippi Levee District would be a mileage tax of $50.00 a mile, or an aggregate of $910.50 per annum, a discrimination in favor of the said railroad company so palpably and arbitrarily unfair as to admit of no doubt of its unconstitutionality.

We copy below the full text of the opinion rendered by the State Court:

W. J. Miller, State Tax Collector, vs. Yazoo & M. V. R. R. Co.

"The Mississippi Levee District was created on November 27th, 1865, at which time there was no railroad within its territory. The railroad, of which appellee is the successor in title, was constructed therein during the year 1885. At that time the manner of taxation for levee purposes, in so far as ad valorem taxes were concerned, was as provided in Sec. 5, Chap. 107, Laws 1878, which provision made an ad valorem levy as follows:— 'A uniform ad valorem tax of not more than five mills upon the assessed value of all property, real and personal, lying and situated in the counties' (naming them) 'as the same shall appear upon the assessment rolls of said counties respectively'.

"In the year following the construction of the railroad, the Legislature enacted Chap. 7, Laws 1886, under which the mileage method of taxation was adopted for said levee district in respect to railroads. A tax of $100.00 per mile upon railroads was thereby levied, and it was expressly provided that this tax should as to railroads be in full of all levee taxes.

"Although in succeeding years the levee laws went through the process of numerous amendments, there is no question but that throughout all of these changes the railroad levee tax in this district remained exclusively on the mileage basis, until the passage of Chap. 125, Laws of 1908, when the Act of 1886 was amended so as to raise the levee mileage taxes to the sum of $200.00 per

mile. In this Act of 1908 there was omitted that express provision which had for twenty-two years theretofore been in all these acts that is to say, the provision that the mileage tax should be in full of all levee taxes. The Act of 1908 was simply silent on that point. Nevertheless, the levee board and all the administrative and executive officers charged with any duty in respect to the revenue of the district construed the Act of 1908 as having made no change in the law as regards the effect that the mileage tax of $200.00 per mile was in full of all railroad levee taxes; and taxes were collected from the railroad exclusively on that basis. Six years thereafter and by Chap. 282, Laws 1914, the law was again amended, using the identical terms of the Act of 1908, except that the mileage tax was raised to $350.00 per mile. This is the last legislative material to the question before us. The Railroad has continued to this day to pay its levee taxes on the mileage basis, and this suit is by the state tax collector to recover, in addition, the general ad valorem tax on the assessed valuation of the railroad as assessed by the state tax commission.

"Although the foregoing history of the legislation on this subject is but a thumb-nail sketch, enough is shown to disclose that from the beginning of the existence of railroads in the district the mileage basis has been the original and the uniformly observed method of railroad taxation for levee purposes in that particular district. Beginning with the first railroad levee act of 1886 down to this date, the subject of railroad levee taxes in that district has been separately treated in separate acts, and always as to general ad va-

lorem taxes the provision has been that these taxes shall be upon the property real and personal 'as the same shall appear upon the assessment rolls of said counties respectively.'

"It appears to us, therefore, as a question which admits of some considerable doubt in the matter of statutory construction whether these statutes, all of them taken together, even after 1908, do not of themselves confine railroad levee taxation in this particular district solely to the mileage basis. In this situation of admissible doubt the construction uniformly placed upon the statute of 1908, and uniformly followed by every executive and administrative officer charged with its execution and administration must now be accepted as the correct construction, in view of the fact that in 1914, six years thereafter, the statute was re-enacted in exactly similar language, *U. S. v. Cerecedo, etc.*, 209 U. S. 337, 339, 52 L. ed. 821; *U. S. v. Polk* 204 U. S. 143; 51 L. ed. 411.

"The principle that the re-enactment by the legislature, without change, of a statute, not free from doubt, which had previously received long continued executive and administrative construction, is an adoption by the legislature of that construction, has an added strength as applied to this case; because under Sec. 234, Const. 1890, no bill affecting the revenues of the levee district can be considered by the legislature until it has been published in a newspaper in the district for four weeks prior to the introduction thereof in the legislature. Therefore, when the bill in 1914 was introduced, it had been previously published to all the people of the district; and it could be easily seen that it was in the same language as the Act of 1908 un-

der which it was known, or could have been known, to every taxpayer in the district that the uniformed and unquestioned previous construction for the past six years—long enough to give everybody notice and knowledge—had been that the mileage tax was the only railroad levee tax. If then there was any purpose either in the legisalture or on the part of taxpayers to change the meaning and effect under the Act of 1914 so as to include the general property ad valorem taxes in addition to the mileage tax, then was the time to do it, and in express language. But this was not done, has never since been done, and we deem the issue as now foreclosed."

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 195.—October Term, 1930.

Columbus & Greenville Railway Company, et al., Appellants and Petitioners, *vs.* W. J. Miller, State Tax Collector, for the use of the Mississippi Levee District.	Appeal from and on Writ of Certiorari to the Supreme Court of the State of Mississippi.

[April 13, 1931.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

On behalf of the Mississippi Levee District, the State Tax Collector of Mississippi sued the Columbus & Greenville Railway Company to collect a tax for the years 1926 and 1927, under chapter 282 of the Laws of Mississippi of 1914, at the rate of $350 a mile on its main line within the District. The Railway Company had paid the tax at the rate of $50 a mile, pursuant to the provisions of an amending act, chapter 259 of the Laws of 1926, which fixed the tax at that rate for a railroad having less than twenty-five miles of main line within the district. The Railway Company fell within the amendment, as its main line in the district was only 18.41 miles in length. The Collector alleged in his declaration that the Act of 1926 was unconstitutional and void because the bill providing therefor had not been published, in advance of introduction, as required by section 234 of the state constitution. Demurrer to the declaration was sustained by the Circuit Court of Montgomery County, but its judgment was reversed by the Supreme Court of the State upon the ground that the classification by the Act of 1926 was "arbitrary and unreasonable, and therefore in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution." 154 Miss. 317, 122 So. 366.

The Railway Company then pleaded that it was not indebted, and gave notice that it would undertake to show that the classi-

fication of the Act of 1926 was valid, and, further, that the statute laying the tax demanded by the plaintiff, that is, the Act of 1914, was itself unreasonable and violated the Fourteenth Amendment. Upon the trial, evidence offered by the defendant in support of these allegations was received subject to objection which the Circuit Court finally sustained, and judgment was entered for the amount of the tax on the basis of $350 a mile. This judgment was affirmed by the Supreme Court of the State in the view that the case was ruled by its previous opinion and that the excluded evidence, if competent, could not have changed the result. 127 So. 784.

An appeal was taken to this Court and a motion to dismiss or affirm was postponed to the hearing on the merits. At the same time, this Court granted a writ of certiorari. 282 U. S. —.

That part of the State of Mississippi, known as the Mississippi Delta, is divided into two districts, the Mississippi Levee District and the Yazoo-Mississippi Delta Levee District, to the end that each district may maintain the levees necessary to protect the lands within it. The Mississippi Levee District, created in 1865, comprises the southern part of the Delta. It is said that four methods of taxation are used to maintain this district, an acreage tax, a cotton tax, an *ad valorem* tax on property generally, and a mileage tax on railroad companies which it appears is in lieu of the *ad valorem* tax. *Miller* v. *Yazoo & Mississippi Valley Railroad Company*, Supreme Court of Mississippi, decided February 23, 1931. Prior legislation providing for the mileage tax on railroads was amended by chapter 282 of the Laws of 1914 so as to impose a tax of $350 a mile on the main line of standard gauge railroads within the district, $87.50 a mile on narrow gauge railroads, and $210 a mile on standard gauge branch lines. Chapter 259 of the Laws of 1926 added to the statute the following proviso: "provided further that the tax per mile per annum on the main line of any railroad company which does not own in excess of twenty-five miles of railroad in the Mississippi Levee District shall be $50 per annum." The Supreme Court of the State, holding that this proviso was invalid under the Fourteenth Amendment, did not deem it necessary to decide whether this ruling invalidated merely the proviso or the entire Act of 1926, as in either event the tax to be paid would be the same.

We are not concerned with any question of the State's policy in imposing taxes, or with the various methods employed in the levee district, apart from the application of the Fourteenth Amendment. The question as to the validity of the Act of 1926 is raised only by the State Tax Collector in his official capacity, as one acting solely under the authority of the legislature whose requirement he contests. The only person taxed by the statute whose rights are before the Court is the petitioner which seeks to uphold the state legislation which defines its liability and with which it has complied. The questions which the Collector sought to raise under the state constitution have not been passed upon by the state court. While, so far as state practice is concerned, the authority of a public officer to assail in the courts of the State the constitutional validity of a state statute is a local question,[1] this fact does not alter the fundamental principle, governing the determination of the Federal question by this Court, that the protection of the Fourteenth Amendment against state action is only for the benefit of those who are injured through the invasions of personal or property rights or through the discriminations which the Amendment forbids.[2] The constitutional guaranty does not extend to the mere interest of an official, as such, who has not been deprived of his property without due process of law or denied the equal protection of the laws.[3]

Apart from this consideration, the only question presented is whether the Act of 1926 with its proviso, or the proviso alone, is invalid upon its face. The evidence offered to support the classification was excluded, and was treated as being in any event without effect, and the case thus stood before the state court upon the bare terms of the statute. If the facts shown by the evidence, thus excluded, were treated as established (*Fairmont Creamery Company* v. *Minnesota*, 274 U. S. 1, 5), they would have no tendency to invalidate the statute, but rather to sustain it. It appears that

[1]Smith v. Indiana, 191 U. S. 138, 148; Huntington v. Worthen, 120 U. S. 97, 101; Stewart, Treasurer, v. Kansas City, 239 U. S. 14, 16.

[2]Clark v. Kansas City, 176 U. S. 114, 118; Standard Stock Co. v. Wright, 225 U. S. 540, 550; Massachusetts v. Mellon, 262 U. S. 447, 488; Roberts & Schaefer Co. v. Emmerson, Secretary, 271 U. S. 50, 54, 55; Liberty Warehouse Co. v. Burley Tobacco Growers' Association, 276 U. S. 71, 88.

[3]Smith v. Indiana, supra; Braxton County Court v. West Virginia, 208 U. S. 192, 197, 198; Marshall v. Dye, 231 U. S. 250, 257; Stewart, Treasurer, v. Kansas City, *supra*.

there are only two main lines of railroad within the district, that of the Yazoo & Mississippi Valley Railroad Company, extending north and south through the entire levee district parallel with the Mississippi River, and that of the petitioner running east from the Mississippi River. The petitioner sought to show not only the difference in location but that the condition of its road and its equipment was inferior to that of the other railroad. The petitioner also offered to prove, and the fact was stipulated subject to objection, that the State Tax Commission had assessed for *ad valorem* taxes the railroad of the petitioner within the levee district at $1000 a mile, and that of the other railroad at $32,000 a mile and, further, that in the classification of railroads by the State Railroad Commission for the purpose of levying a privilege tax, the petitioner was placed with respect to its main line in class three and the other railroad in class one.

Without attempting to appraise the excluded evidence with respect to the asserted differences between the two railroads, it is sufficient to say that, if this evidence be disregarded, the record shows no factual basis for holding the classification of the statute invalid other than the simple fact that the classification is according to mileage. But the mere selection by the state legislature, in the exercise of its broad discretion in the imposition of taxes,[4] of a mileage basis, and the establishment of a particular class of railroads having less than twenty-five miles of main line within the district, cannot be regarded, in the absence of any further showing, as arbitrary and as constituting a violation of the Federal Constitution. On the contrary, a classification of this sort has frequently been sustained. In *Dow* v. *Beidelman*, 125 U. S. 680, 691, a statute classifying railroads according to mileage, with respect to the passenger fares to be charged, was sustained. The Court said: "Whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings, during a previous year, or according to the simpler and more constant test of the length of the line of the railroad, is a matter within the discretion of the legislature." To the same effect is *Chesapeake & Ohio Railway Company* v. *Conley*, 230 U. S. 513. Similar rulings have been made in upholding other regulatory statutes; *e. g.*

[4] Bell's Gap Railroad Co. v. Pennsylvania, 134 U. S. 232, 237; Ohio Oil Co. v. Conway, 281 U. S. 146, 159.

statute relating to the heating of passenger cars but not applying to railroads ~~more~~ less than fifty miles in length (*New York, New Haven & Hartford Railroad Company* v. *New York*, 165 U. S. 628, 633, 634), and statutes requiring a minimum number of men in train crews but not applying to railroads of less than a stated mileage (*Chicago, Rock Island & Pacific Railway Company* v. *Arkansas*, 219 U. S. 453; *St. Louis, Iron Mountain & Southern Railway Company* v. *Arkansas*, 240 U. S. 518). See, also, *Wilson* v. *New*, 243 U. S. 332, 354.

As we find no ground for holding the Act of 1926 to be invalid under the Federal Constitution, it is unnecessary to consider the questions discussed in relation to the Act of 1914.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.